The
INTERNATIONAL LEGAL STATUS
of the
KWANTUNG LEASED TERRITORY

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BY
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JAPAN'S JURISDICTION AND INTERNATIONAL LEGAL POSITION IN MANCHURIA

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To
Westel W. Willoughby, LL. B., Ph. D.,
Professor of Political Science
at
The Johns Hopkins University,
This Volume Is
Respectfully
Inscribed.

"General propositions do not decide concrete cases."—Mr. Justice Holmes' dissenting opinion in *Lochner v. New York* (1905). 198 U. S. 45, 25 Sup. Ct. 539.

GENERAL PREFACE

The three volumes, of which this is one, include the following titles: *Japan's Special Position in Manchuria, The International Legal Status of the Kwantung Leased Territory,* and *Japanese Jurisdiction in the South Manchuria Railway Areas.* These together comprise a series, under the general title: *Japan's Jurisdiction and International Legal Position in Manchuria.* Although they have been written simultaneously, and may be regarded as a unity for the purpose of analyzing the international legal position of Japan with respect to Manchuria, each volume is in itself a unified whole, a separate book.

These studies are not history. They are rather studies in politics and international law. The materials of the historian have been drawn upon only to furnish the essential stuff for a background, and to present the sequence of events which is essential to a delineation, description and evaluation of the particular categories of politics or law dealt with. Facts, then, which may be of interest or essential to the historian, may have had to be intentionally excluded from this study. The methods of dealing with the facts naturally have been those rather of the student of politics than of history. However this may be, the sequence of historical events has been followed, where possible, so that the very de-

velopment of the problems of legal status and right, whether with respect to the Kwantung lease, the South Manchuria Railway, or the general position of Japan in Manchuria, may be traced through from their origins to the present.

Nor are these studies in the field of economics. But, as economic, like historical, facts are intimately bound up with those of politics and the law—as, for example, in the question of the prior right of foreign financiers to furnish the capital under a specific loan contract for the construction of a Manchurian railway—it will be seen that these volumes, especially the one dealing with Japan's claims to a "special position" in Manchuria, are alive with material of interest to the student of international economic relations. Viewed from the point of view of legal rights and status, much will be found here which make up the ground plan, the rights, the restrictions, the avenues through and around which trade and capital enterprises have developed in Manchuria.

Finally, these are not, primarily, studies in diplomacy, foreign policy, or colonial administration. Particularly is this true of the volume dealing with the international legal status of the Kwantung leased territory. This is a subject which lends itself to legal analysis, in spite of its reputed confusion in international law. Japanese administrative rights here and in the South Manchuria Railway areas are studied only in so far as such description may have utility in clarifying the fundamental questions of

legal right, under treaties and international law, which are here considered to the exclusion of questions of administrative organization or the wisdom or unwisdom of administrative policies.

But international legal situations would be deprived of both interest and clearness were they entirely divorced from the realities of diplomacy. The question of intent may be the major subject of a particular inquiry—as that of China's intent in leasing Kwantung to Russia, and permitting its transfer to Japan—and, to answer such a problem satisfactorily, history and diplomacy must be drawn upon for any adequate interpretation. To treat the question of the validity of the Sino-Japanese treaty and notes of 1915, which extended the Kwantung lease period to ninety-nine years, without some considerable attention to the exceptional diplomacy which attended the signing of those agreements, would produce conclusions of little worth—a formalistic dialectic in which no jurist would indulge.

Diplomacy, the complex negotiations affecting Japan's position in Manchuria, even the asides and the overtones of policy, revealed at times by incidents, actions, opinions, perhaps even attitudes which are the psychological stuff that give new meaning, real meaning, to terminology with which we must here deal, these cannot be divorced from a legal analysis.

Japan's " special position " in Manchuria is a far different thing in the mind of a Japanese, who may

not have concerned himself with the question of Japan's legal rights in Manchuria, than it is to those who view that terminology shorn of its aura of historical and patriotic associations. But the possible value and the limitations of our approach here is suggested by this situation. If a defense of that approach or method were necessary, it would be found in the terse language of that eminent English publicist in international law, the late Professor T. J. Lawrence, when he wrote on leased territories in China: " As a rule words describe things. In diplomacy they are sometimes used to describe—well, other things! " These " other things " are very frequently omitted from treaties and official correspondence—but they may be what the master in chancery would be quite willing to regard as admissible testimony.

Inevitably, especially in dealing with Japan's claims to a " special position ", to " special rights and interests ", and to " vital interests " in Manchuria, it has been impossible to avoid some judgment—or perhaps some presentation of a situation which will influence the reader's judgment—as to the right or wrong of a particular state policy. The author has been cautious not to abuse that discretion which he has had to exercise in presenting such materials. Nevertheless, the manner in which he has exercised that discretion is a proper subject for criticism by the impartial reader. A caveat, which may, perhaps, be superfluous if the contents of one

of these volumes be tempered with that of another, needs to be emphasized here: whatever impressions may be gained as to the author's views on the questions of state policy involved may be entirely inadequate reflections of the author's real views on these very questions. In fact, there are numerous such questions pertaining to Japan's position in Manchuria, and dealt with at length in these volumes from a legal point of view, which, if the author's purpose were to appraise foreign policy as such, or pass judgment on the ethical considerations, the questions of intrinsic justice, or even of expediency, would have had to have been developed in a manner far different, and to other conclusions, than are even suggested in these volumes.

The author can lay no claim to having arrived at the maturity of judgment which would enable him to claim complete consistency in the application of his method to so dynamic an international situation as exists in Manchuria. This field is so primed with a special interest for him that the dangers of distortion of what should be a dispassionate and impartial weighing of the facts against the rules of law applicable are many. He has been working in an uncharted frontier, where rules of international law are as frequently honored in the breach as in the observance. "Manchuria and International Law!"—what bedfellows! To introduce one to the other may not always produce congenial consequences.

International law is itself full of wide gaps. There is frequently an absence of universality of accep-

tance of even basic principles. At times, the principle which has widest acceptance by states and publicists alike may fall short of producing justice in a given circumstance. Ethical standards may suffer from the rigid application of a generally accepted legal rule. Are we then to cast aside the rule of law? Is it not essential rather to state the rule of law, then apply it, and remain an honest interpreter of the law, than to attempt to create a new rule of law, founded on nothing but expediency? There is, too, a broader question of expediency involved, for international law itself may be at stake. International law, like all law, is constantly developing. It grows to the ideal, but never can reach it. If the reign of law is to survive, and order remain in international relations, the task of the interpreter of international law is to inquire as to what it is at a particular time, and not to presume for himself the right to so interpret it as to suit his private views as to expediency in applying it to a situation which he, were he a diplomat, might wish to deal with quite otherwise. Here, in Manchurian situations, we shall find numerous illustrations of cases where international legal rules and principles have been badly strained to suit the national purposes of particular states.

This is not to say that legal situations in Manchuria here treated would not possibly have to be interpreted very differently after a decade or two. The law itself will change. Old issues of practical

diplomacy may have to be reopened. For the present, however, it is well to draw the line as sharply as possible between the law as it now exists and the ideal which will bring complete justice in given situations. Diplomacy itself will have to deal with such situations, and may well have to find solutions on the basis of wise policy. Legal rights need clearly to be understood and respected; they may be given up, and, perhaps, must be given up, in the interest of the very state who may have a perfectly valid legal claim to them. It is, nevertheless, essential, particularly in these Manchurian situations, to know the precise limits of legal rights claimed and justifiable before diplomatic negotiation can proceed with practical solutions. There is need, too, to know when rights claimed are not justifiable; to know when actions criticized as taken illegally, are actually justifiable under the treaties and under international law. There has been far too much assertion and counter-assertion as to Japan's treaty rights in Manchuria, without much attention to the verities which, in most cases, can be accurately described.

* * * *

In the several years which the author has required to assemble the materials presented in these volumes he has had the benefit of close association with scores of Japanese and Chinese officials, administrators, technicians and scholars in Manchuria, and with some who, occupying responsible posts elsewhere,

have had intimate kowledge of Manchuria. The generosity with which these individuals have coöperated in furnishing otherwise unavailable data, including much that has not previously been published even in their own languages, has made this work possible. No amount of mere residence in Manchuria could have supplied that need, though it may be that some considerable residence there has enabled the writer to develop those friendships and intimacies without which his investigations must necessarily have been regarded—to put it quite frankly—as pestiferous.

Unfortunately, it is quite impossible here even to mention the many Japanese and Chinese who have furnished the writer with valuable materials for these studies. They will know, perhaps by chance reference to portions of these volumes, how much the author may be indebted to them for materials, and may take that dependence as an expression of the author's gratitude to them.

In the nature of the case—since these studies, and especially one volume, have to do with the South Manchuria Railway—the many officials and staff members of the South Manchuria Railway Company, especially in Dairen, have been of the greatest assistance. The author has time and again imposed upon their more important duties and has received in return unfailing courtesy and consideration. I know of no other private or public institution, at all similarly situated, which could have been approached with greater assurance that my requests would be received with efficiency and generosity. Why the

author, through four distinct administrations which have had the railway in charge, has been so liberally treated will, no doubt, be answered differently by various readers of these volumes. To the author himself, however, this generosity remains somewhat of a puzzle. To Kwantung Government officials, also, the author wishes here to express his gratitude for their coöperation in supplying him with essential materials not otherwise available.

Materials of the Foreign Intercourse Office, maintained by the Chinese Government at Mukden, have been placed at the writer's disposal by Chinese friends. Some have been supplied by Chinese scholars associated with Northeastern University at Mukden; others, by officials. In the nature of the case, many of these materials have had bearing upon those most contested questions, of principal concern in contemporary politics, which have to do with the jurisdiction and activities of the Japanese railway guards along the South Manchuria Railway areas, or have bearing on the administration of the so-called "railway towns".

Under these circumstances, it must be apparent that it is with no intention to overlook these many favors that the author takes this occasion to express, by specific reference, his indebtedness to his revered professor, Dr. W. W. Willoughby, of the Johns Hopkins University, whose personal counsel has been hardly less valuable than the materials which the author has been permitted to draw from the sev-

eral scholarly books of this distinguished student of constitutional and public law, as well as of the Far East. To thank him for his generous preface is not to admit that his concluding paragraphs are at all defensible!

To Dr. John V. A. MacMurray, formerly American Minister to China, for many years in the service of the Far Eastern Division of the Department of State, and now head of the Walter Hines Page School of International Relations at the Johns Hopkins University, the author's thanks are due for suggestions and valuable criticism. No student of Far Eastern politics and diplomacy can overlook his well-known compilation of China treaties and agreements. He must rather depend constantly upon it.

To those who have labored through the galley proofs, the author wishes here to express his indebtedness for suggestions and criticism. Mr. C. Gordon Post, instructor in political science at the Johns Hopkins University, has taken the responsibility for preparing the indices of these volumes and has executed his task with care and the exercise of a certain judgment for which his training has qualified him. For the tedious task of reading the " first galleys ", as well as for her tolerance in listening to the author's defense—not always impregnable—of his original manuscript, and for suggestions as to revision, especially in the interest of clarity of expression, the author wishes here to express his gratitude to Gladys Hildreth Young.

Whatever may have been the degree of dependence of the author upon certain materials, generously made available in English translations from Japanese and Chinese originals, he is in a position to accept full responsibility for such use as has been made of them in these studies. For the material content of the volumes, the interpretations presented, and the conclusions drawn, he must assume like responsibility.

C. WALTER YOUNG
THE DUNDEE ARMS
BALTIMORE
July, 1931

FOREWORD

BY

W. W. WILLOUGHBY

The Washington Conference of 1921-1922 marked the beginning of a new era in the history of China's dealings with the other Powers. For the first time China was then enabled to sign treaties and other agreements which secured benefits to herself. Prior to then she had been compelled to grant rights to the other Powers. Since then she has continued her efforts to free herself from the conventional limitations upon the free exercise of her sovereign powers, with the result that the time does not appear far distant when she will be, in almost all respects, mistress within her own political household.

However, it is clear that it is within the Manchurian provinces that she will find her greatest difficulty in bringing about a status that will be completely satisfactory to herself, for it is there that Japan has developed such extensive economic interests that she is unwilling to look forward to the time when the maintenance of these interests will be wholly subject to the political control of China. Therefore, although, in a number of respects, Japan has yielded to China's insistent demands for a greater freedom from the unilateral limitations that

have been imposed upon her sovereign action, she, Japan, has jealously guarded those treaty rights, which, in her opinion, make more secure, or, perhaps, more ample, these economic interests which she has in the Manchurian area, and which, she has several times declared, are vital to her own national life.

At the same time, it is to be observed that some of the more important political or jurisdictional rights in Manchuria to which Japan now lays claim are based upon the treaties and agreements which resulted from the "Twenty-one Demands" which Japan made upon China in 1915, and which, because of the nature of those demands, and of the circumstances under which they were made, the Chinese, though compelled to sign them by a formal ultimatum from Japan, have consistently declared to be without a moral basis, and, therefore, subject to be disregarded by them when the opportunity to do so presents itself.

A further complicating factor in the Manchurian situation is that provided by the Russian interests. At the present time, leaving aside the situation in Outer Mongolia, these relate principally to the Chinese Eastern Railway. In addition to this railway problem, which is an exceedingly complicated one, there is no assured confidence upon the part of either China or Japan that, when Soviet Russia has brought her domestic household into what would appear to be a permanently satisfactory order, she will not again attempt to extend her political control over the

northern parts of Manchuria, or even, under favoring circumstances, over southern Manchuria, and thus not only trespass upon China's territorial sovereignty but again present that threat to Japan which, in 1905, led to the Russo-Japanese War.

It is clear, then, that here in Manchuria exists a situation which can easily lead to serious international conflict. This being so, it is of the utmost importance that the facts of the situation should be made clear to the world. In the present volume, which is one of a series of three, Dr. Young has sought to do this so far as the jurisdictional rights to which Japan lays claim in Manchuria are concerned. It is a fortunate fact that one so eminently qualified should have set himself to this task. By his previously published writings, Dr. Young has gained for himself a high reputation as a scholar in this field. More than this, he has shown an ability to deal in an impartial way with problems which, to one less objectively minded, offer abundant opportunity for emotional and, therefore, less balanced treatment. Also, it is to be added, that Dr. Young has not contented himself with the information obtainable from official documents and other printed sources, but has made repeated visits to China and Japan, and has travelled extensively in Manchuria in order that he might see conditions at first hand, and, by personal interviews with leading officials, obtain a truer insight into the significance of these conditions than could be derived from an examination of printed documents or from formal official declarations.

It is the considered opinion of the writer that these three volumes constitute one of the most important contributions which have been made during recent years to the scientific study of political conditions in the Far East. It is to be hoped that Dr. Young will, in the near future, carry his studies of the Manchurian problem into other than the purely jurisdictional field, and provide scholars with an evaluation of the essential economic, social and political interests which are involved, as well as with a detailed account of the manner in which the jurisdictional rights in Manchuria have, in practice, been exercised and of the results that have flowed therefrom. One may even hope that Dr. Young will eventually feel justified in departing from the purely scientific and objective field, and enter that of the statesman in order to express his own matured and factually fortified judgment as to what should be the Manchurian policies of all the nations concerned.

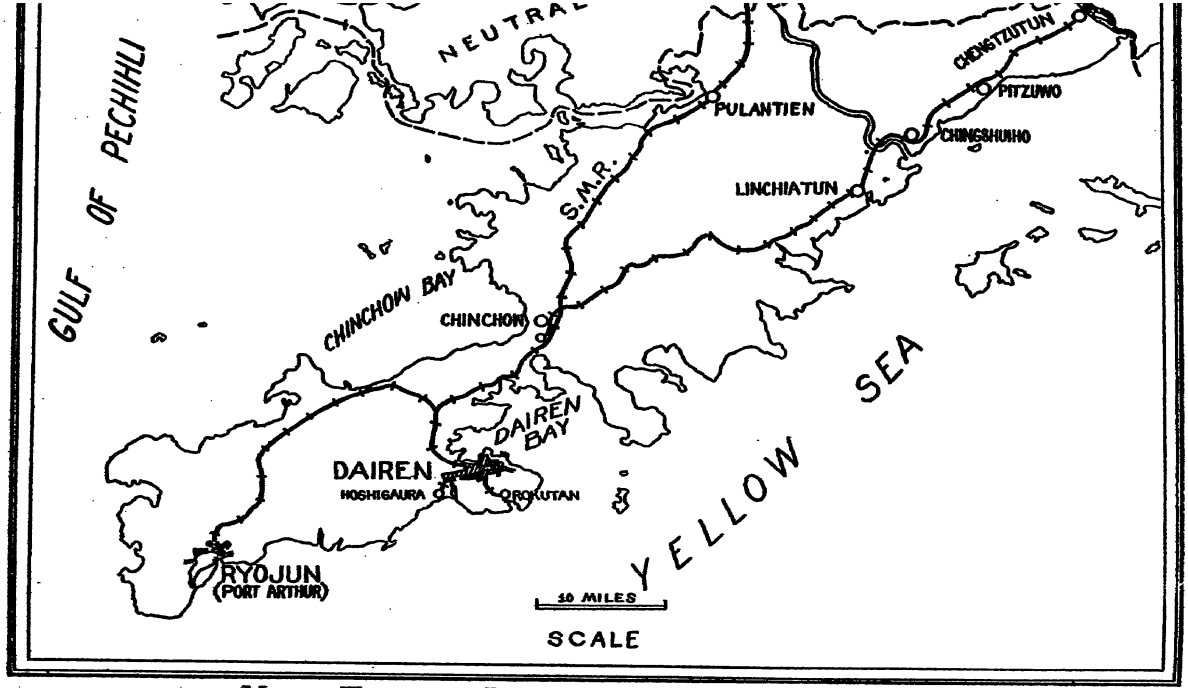
W. W. W.
THE JOHNS HOPKINS UNIVERSITY
July, 1931

ERRATA

Page 156, last line: for "Dr. C. T. Wang", read Dr. C. H. Wang (Wang Chung-hui); also same in footnote 4.

Page 212, line 12: for "Dr. C. T. Wang", read Dr. C. H. Wang.

Page 249, in Index: for "Wang, C. T.", read Wang, C. H.



MAP OF KWANTUNG LEASED TERRITORY (MANCHURIA, CHINA)

INTRODUCTION

The Kwantung leased territory in southern Manchuria, China, has been in Japanese possession since the Russo-Japanese war, or, in other words, for over a quarter century. When this lease was obtained by Russia in 1898, and until the close of the Russo-Japanese war, its identity was almost entirely eclipsed by the world notoriety of its then principal city, Port Arthur, that Kronstadt of North China which was the scene of the awful carnage attending the storming and capture of its heights by the Japanese troops, first, in the war against China in 1894-95, and then in the Russo-Japanese war in 1904-05. Since the Russo-Japanese war, however, Port Arthur has dwindled almost into insignificance: it is no longer a fortified city of importance, and long since has ceased to be a Japanese naval base.

The importance of the Kwantung leased territory for the last twenty years has been rather the result of two considerations: it commands the approach from the sea into southern Manchuria, and retains a strategic value especially because the southern terminal of the South Manchuria Railway is located within it, that is, at Dairen; secondly, it may properly be regarded as the *point d'appui* of southern Manchuria and the sea for commercial purposes. Dairen, known by the Chinese as Talien, where in

the closing years of the last century the Russians reared the mushroom town of Dalny, "The Far Away City", has risen to a position of commercial importance in Eastern Asia which leaves it today unrivalled in Manchuria as an *entrepôt* for foreign imports to the hinterland. Under efficient Japanese administration, the city of Dairen has become a city of over a hundred thousand population, superbly equipped as a harbor for handling world ocean-borne traffic, with the result that Dairen today is the principal port of shipment for the produce of Manchuria. From a position of insignificance in 1897, Dairen has grown to one of world importance, its total foreign trade today being second only to that of Shanghai along the entire China coast. Dairen is the base of commercial operations of the Japanese in Manchuria; Port Arthur is but the seat of the government of the Kwantung leased territory, or Kwantung Province, as it is known under Japanese constitutional law.

The Kwantung leased territory, commonly referred to as "The Liaotung Peninsula"—which latter term properly should be used to apply to a somewhat larger region—has, then, an importance which is not to be measured either by its size, or by the intrinsic truth of the commentary of that intrepid traveler, Abbé Huc, who, during the middle of the nineteenth century, gave this region "distinguished rank for the aridity of the soil". Manchuria is its granary, and these, the Three Eastern Provinces of China, are rich, now and potentially.

In this small volume an attempt has been made to deal exclusively with the international legal status of the Kwantung leased territory. Leased territories as such are uncommon in contemporary international life. Time was, however, when this and the several other leased territories in China, including Kiaochow, Weihaiwei, Kowloon and Kwangchow, had much more than esoteric importance. They were the loci of the naval bases which, in the last century, European powers acquired from China along her shores. Of these, Kwantung survives as of even greater importance today than formerly. These considerations give Dairen and even Port Arthur a new world significance. Around them revolve the complex separate orbits of problems which, in their totality, make up the Japanese phase of the so-called "Manchurian Question".

The purpose of this volume—one in a trilogy which deals also with *Japan's Special Position in Manchuria* and with *Japanese Jurisdiction in the South Manchuria Railway Areas*—is to present an analysis of the status of the Kwantung territory in international law and under the treaties by which it came to be possessed by Japan. As such, it necessarily is a somewhat technical study, of interest to students of international law, as well as to those who interest themselves in the problems of Eastern Asia. By the former, it may be accepted as the first attempt to deal exhaustively with one particular leased territory in China, a study which, like studies of the in-

ternational legal status of the mandates under the League of Nations, deals necessarily with one of the exceptional situations of international law, and, finally, as an attempt at interpretation of a legal situation which places emphasis upon the realities out of which international law itself must develop. To the general student of Far Eastern politics and diplomacy, on the other hand, this study may have some special value in supplying a body of technical and historical data, organized, interpreted and appraised, which, if the aims of the author have been achieved, will caution the student, the historian and the journalist to be more mindful of the use of words to describe things than has been the case in the past.

C. W. Y.

CONTENTS

THE INTERNATIONAL LEGAL STATUS OF THE KWANTUNG LEASED TERRITORY

CHAPTER I

Sovereignty and Jurisdictional Rights

1. The Necessity of Distinguishing Sovereignty and Jurisdictional Rights. The controversy among publicists in international law as to the situs of sovereignty in mandated territories under the League of Nations has directed attention anew to the assumptions underlying the rival positivist and "natural law" schools as to the nature of sovereignty or independency in international relations. It has given new emphasis to the basic problem underlying all international law—its source and sanctions. This controversy has almost completely obscured that which, during the opening years of this century, was motivated by the problem of leased territories, especially the China leases.

Curiously enough, however, the still unsettled controversy over sovereignty in the mandated territories has caused the publicists to tread with pioneering steps across frontiers which, in certain situations, were explored by those who attacked the problem of leased territories. But these latter explorations were but partially productive. In fact, our heritage from the early twentieth century discussion

of the international legal status of leased territories in China is a questionably valuable offering. Greatest unanimity among the publicists appears in their characterization of these leases as "disguised cessions"—a conclusion which, particularly in the light of subsequent historical fact surrounding the actual return of the Kiaochow and Weihaiwei leases to China, must be declared to be both invalid in strict law and irreconcilable with the practical facts of realistic diplomacy.

Central among the issues raised by the problem of sovereignty with respect to both mandated and leased territories is this one: Does the possession of sovereignty carry with it an exclusive right to exercise jurisdiction in the territory over which that sovereignty is conceded? Otherwise stated, is the monist conception of the state tenable in the light of such apparent exceptions to the rule as are presented by the leased territories in China where political functions are alienated to foreign states? The very location of sovereignty is itself in controversy in the case of the mandated territories under the League of Nations. This has been the case, also, with leased territories, but, as this study will endeavor to indicate, the problem of the actual situs of sovereignty over leased territories need not have been as complicated as the publicists actually made it.

Whether, with respect to mandated territories, we must now conclude that the time has come when conceptions of sovereignty, irreconcilable with the

monist view, must be accepted by the realistic publicist, is not within the scope of this study.[1] Our concern here is solely with the international legal status of leased territories, particularly as evidenced by the status of one, the Kwantung lease in Manchuria. The object, then, of this study is rather to ascertain the real status of the Kwantung lease as a practical problem of contemporary international law and diplomacy than to develop the inferences as to those general concepts of sovereignty which will inevitably, but always incidentally, have to be treated in context.

Leased territories, especially of the type properly described as *international political leases,* have long

[1] Professor Quincy Wright has written especially to this point in his recent excellent work on the mandates. His realistic approach is suggested by his statement that "convenient as territorial sovereignty may be, it is neither necessary nor is it a condition actually existing in every part of the world". (*Mandates under the League of Nations,* p. 268.) We have, in fact, a state system which reveals "a tropical luxuriance of political and legal organization, competence, and status". (p. 276.) Professor Wright declines to accept the "municipal-law" point of view of international law, and concludes that sovereignty in international law is capable of division, that sovereignty "is the capacity to have jural relations with other sovereigns", and that, when the jural relations of states be studied in practice, it is evident that various states possess sovereignty in varying degrees. (p. 286.) Dr. Wright clearly rejects the monist and analytical jurist's conception of sovereignty as a thing indivisible. He admits "divided sovereignty" over a state. (p. 300.) With respect to mandated territories, and expanding his earlier view, he concludes that what actually exists with respect to certain mandated territories at least is that there is "joint sovereignty", rather than "divided sovereignty", and that this sovereignty is jointly held by the mandatory and the League itself. (p. 337.) Whether it is, in fact, necessary, to posit "divided sovereignty" for a realistic description of the legal status of leased territories in China will be dealt with in context later.

presented to students of international law situations which have been considered highly puzzling and somewhat anomalous. They are, to be sure, distinct exceptions to the rule that the state which possesses sovereignty over a specific territory also has the right in practice to conduct political administrative functions and establish its courts of law in the area. Sovereignty, viewed as supreme legal competence, necessarily has different connotations when viewed from the municipal law or the international law point of view.[2] Viewed from the international legal angle, sovereignty may well be considered as the ultimate right to dispose of territory or to control its eventual destiny. This *ultimate* right to dispose of territory should not be confused with the *actual* exercise of jurisdiction within a given territory: the latter, however inclusive, may be, juristically speaking, an exercise only of delegated or conferred rights, the real source of which must be traced to the state which has sovereignty itself. It is confusion as to this situation which led the publicists of the early twentieth century to confound the situs of sovereignty with the actual exercise of administration in the leased territories in China. Because all, or practically all, jurisdictional rights over the territory were in fact

[2] ". . . . The idea of Sovereignty, as it is found in constitutional law, can find no proper place among international conceptions." (Willoughby, W. W. *The Fundamental Concepts of Public Law*, p. 283.) This would seem in itself to be conceded by Professor Quincy Wright, but the inferences then to be drawn place him in opposition to the conclusions of Dr. Willoughby. (*Ibid.*, pp. 285 ff.)

waived, for the period of the lease, in favor of the lessee state, they concluded that the reservation of sovereignty to China, the lessor, was a fiction, of neither legal nor practical importance. Here was error.

This reservation of sovereignty to China, the lessor state, was, in the original lease conventions of 1898, in some cases definite, in others indefinite or actually not evident at all except by inference. Failure to consider the actual texts of the lease conventions, and their variations, originally led the publicists to deal with them as uniform situations, a tendency which is still evident among contemporary writers. The fact is that in the case of the Weihaiwei lease to Great Britain (July 1, 1898) there was no specific mention of reservation of sovereignty to China.[3] Great Britain was given "sole jurisdiction". Nor was there any textual reservation of sovereignty to China over the Kowloon lease extension made in the same year.[4] Great Britain was given "sole jurisdiction" over the territory, except for the city of Kowloon, over which the exercise of Chinese jurisdiction might continue only if and so long as it was not "inconsistent with the military requirements for the defence of Hong Kong". In the case of the German lease at Kiaochow, China agreed to "abstain from exercising the rights of

[3] MacMurray, J. V. A. *Treaties and Agreements with and concerning China*, Vol. I, pp. 152-153.

[4] *Ibid.*, pp. 130 ff.

sovereignty" over the leased territory (convention of March 6, 1898), the wording indicating that sovereignty itself was reserved to China, the lessor, although there was no specific statement to this effect in the lease convention.[5] In none of these lease conventions was there any such specific statement of reservation of sovereignty to China as was included in the Liaotung lease convention of March 27, 1898, between China and Russia. "This act of lease, however, in no way violates the sovereign rights of H. M. the Emperor of China to the above-mentioned territory."[6] From the context, however, and, in view of the broad delegation of almost exclusive jurisdictional authority to the lessee, Russia, it would seem more accurate for the convention to have substituted simply the term "sovereignty" for the "sovereign rights" of China in the sentence quoted.[7]

As for the extent and nature of the powers of administration obtained by Russia and later Japan in the Kwantung leased territory it is now as evident as in the days of Russian occupation that the authority of the lessee is, in fact, practically unlimited. Six years of Russian occupation (1898-1904) and a quar-

[5] MacMurray, Vol. I, pp. 112 ff.

[6] *Ibid.*, p. 119.

[7] The terms "Liaotung lease" and "Kwantung lease" are used interchangeably in this study. This leased territory was originally called the Liaotung lease in the Russo-Chinese convention of March 27, 1898. During the Russian period of administration it was termed "Kwantung Province" (not to be confused with Kwangtung province in which Canton is located), and that is the official name today, or "Kwanto", in Japanese.

ter century of possession of governmental power by the Japanese have served to strengthen the views of the publicists of the time, however erroneous were their views as to the situs of sovereignty itself, that, so far as exercise of jurisdictional rights within the territory in lease was concerned, the lessee was almost unrestricted by any limitations. Having concluded that the reservation of sovereignty to China was a myth, a sop to the Cerberus of China's susceptibilities, they naturally confused these leases with outright cessions, dubbing them "disguised cessions", and placed emphasis upon the fact that the lessee was the *de facto* possessor of administrative rights. Allowing for minor exceptions of specific jurisdictional functions reserved by China in Kwantung, the general conclusions of the early twentieth century publicists were essentially sound as to jurisdiction in these leased territories.

One publicist, Professor T. J. Lawrence, a legist with a sense of humor as well as independence of judgment, addressed himself directly to the international legal status of the Kwantung lease as established by the Sino-Russian lease convention of 1898. The result was perhaps the most lucid commentary of the period on these leased territories in China. Not only did Professor Lawrence raise the questions which puzzled his fellow publicists, and caution them against "old theories which fail to explain new facts", but he expressed very clearly the view, which subsequent events have shown to be correct, that, whatever China's ultimate right to re-

cover the territory, the lessee possessed, during the period of the lease, practically unlimited rights of jurisdiction. His very realistic interpretation of the status of the Kwantung or Liaotung leased territory follows:[8]

"As to a lease we are familiar in our own law with the powers of lessor and lessee. The matter is simple enough when such things as a house or a flock of sheep are concerned. But how does it work out when we have to deal with state authority? Who has jurisdiction in a leased territory, the state which grants the lease or the state to which the lease is granted? Or have they concurrent authority therein? If jurisdiction belongs to the grantor state, what are the rights which have been transferred to the grantee by the lease? If the grantee can exercise jurisdiction, what rights remain to the grantor whose sovereignty is supposed to be unimpaired? If both states share jurisdiction, where is the boundary line to be drawn between their respective spheres? There is no limit to the legal conundrums that might be invented by a little ingenuity. But in order to solve them satisfactorily we must qualify the theories of jurists by considerations drawn from the hard facts of international intercourse. And after all, old theories which fail to explain new facts are themselves in need of modification. Law was made for men and states, not men and states for law.

"Turning then to facts, we note an agreement of opinion among all the powers except Japan, that when once Russia had obtained a lease of Port Arthur, Germany of Kiao-Chau, and Great Britain or Wei-hai-Wei, foreign consuls in these places could no longer exercise the special powers granted to them by treaty with China. The territories in question were held to be under the full and exclusive jurisdiction of the states to which they were leased, whose authority was deemed supreme

[8] Lawrence, T. J. *War and Neutrality in the Far East*, pp. 270-271.

while the lease remained in operation. Further, we must remember that the administration passed entirely to the lessee states, who not only carried on the government, but erected fortifications, established garrisons, and even dealt with Chinese inhabitants as resident aliens. Bearing these things in mind, we are forced to the conclusion that a lease in international transactions is not the common-place and innocent affair we know so well in dealings with private property. It amounts, in fact, to a cession of the leased territory for a limited time, and with a strong probability that the period mentioned in the lease will be prolonged indefinitely if the lessee state finds it convenient to stay on. With regard to it, law and fact harmonize badly, and the difficulty arises from the useful diplomatic habit of veiling harsh acts with pleasant terms. The words which reserve the sovereignty of the lessor are fine phrases used for the purpose of disguising the reality of territorial transfer. They may be likened to the jam which renders palatable the child's powder, or the courteous formula which conceals a social rebuff. We regret our inability to accept the invitation we regard as an impertinence. We are the obedient servants of the letter-writer we wish to keep at arm's length. In the society of nations there are similar forms, and the lease is one of them. As a rule words describe things. In diplomacy they are sometimes used to describe—well, other things!"

The passing of over three decades since the original lease to Russia has proved the wisdom of these words as to the extent of political authority possessed by the lessee state. Time, however, has given new application to Professor Lawrence's own fine phrase that "old theories which fail to explain new facts are themselves in need of modification", with the result that his conclusion as to the permanence of these so-called leases is itself in need of modifica-

tion. Moreover, the fact of the actual retrocession of two of these leased territories to China since the Washington Conference in 1921-22 has shown that the retention of "sovereignty" by China has not been meaningless. It was the expression of a right which China has since asserted, and actually secured in the case of Kiaochow and Weihaiwei, the right to recover these territories at the expiration of the lease, or before.[9] However much China may be constrained by force, as in the case of the extension of the Kwantung lease to ninety-nine years in 1915, the right to recover the territory eventually is now clearly established by the precedents already citable, and by the very fact that Japan herself, by taking care to renew her lease before its expiration in 1923, has admitted that possession of the Kwantung territory has a time limit. It would seem, therefore, that there is even more purpose now than formerly to distinguish as sharply as possible between the jurisdictional rights of Japan in Kwantung and the rights remaining in the lessor as derivable from the fact of possessing sovereignty over the territory, a distinction which should be kept in mind throughout the following sections.[10]

[9] Cf. Lauterpacht, H. *Private Law Sources and Analogies of International Law*, pp. 186-187.

[10] "International lawyers should experience no difficulty in distinguishing between legal sovereignty and the actual exercise of rights of jurisdiction, as well as in correctly construing legal relations between States in which not only rights of property *stricto sensu* but also their counterpart in international relations, namely, the rights pertaining to territorial sovereignty, are made the object of a contract

What, then, are we to conclude with regard to the importance of this reservation of sovereignty to China? Is the Kwantung lease, so far as China is concerned, a territory within which the lessor has merely a *nudum jus* or *nuda proprietas*? Is this lease actually now Japanese territory?

An affirmative answer to the last question overlooks the letter of the original lease convention between China and Russia, and tends to confuse this lease with an outright cession. A negative answer fails to take account of the broad grant of jurisdictional authority to the lessee, first Russia, then, after 1905, Japan, and fails likewise to meet the realities of the situation, which, since the Russo-Japanese war, show clearly that the Japanese Government has practically unlimited power to govern the territory.

The fact is that the realities of the situation compel the conclusion that the only tenable approach to an analysis of the international legal status of the Kwantung leased territory must be one which distinguishes clearly between the implications involved

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of lease." It appears now that publicists are beginning to discard the theory of disguised cessions. (Lauterpacht, *op. cit.*, pp. 180 ff.)

Similarly, Professor Quincy Wright has well stated the distinction between sovereignty and actual exercise of jurisdictional rights: "The possibility of divorcing territorial sovereignty from occupations and comprehensive jurisdictions in time of peace has been shown by leased territories, administered territories, intrusted territories—all of which resemble familiar divorces of ownership from possession in private law." (*Mandates under the League of Nations*, pp. 372-373.)

That sovereignty was retained by the lessor in the Kwantung lease was admitted by the Japanese Government in 1900, during the period of Russian occupation. (*U. S. For. Rels.*, 1900, pp. 383 ff.)

in the reservation of sovereignty to the lessor and the delegation of jurisdictional rights for the period of the lease to the lessee. This is quite different from assuming that sovereignty, as such, is divided, or that here is an illustration of "condominium" or "coimperium".

Nor is it believed to be helpful in elucidating the status of the Kwantung lease to describe it as actually under the sovereignty of the state which is not the "territorial sovereign".[11] Sovereignty over the territory is clearly reserved to China, the "territorial sovereign". Such rights as are possessed by Japan—and these are, during the period of the lease, most consequential—are better described as *jurisdictional rights,* rights which, from an international legal point of view, are *conferred rights,* deriving their character from the original lease convention, and obtaining their *legal sanction* from the fact that China, the lessor, in exercising her sovereignty, has conferred them upon the lessee.

In so far, then, as the Kwantung lease is concerned we have no illustration of what has frequently been called "divided sovereignty".[12] Kwantung is no exception to the principle—than which there are few

[11] Wright, op. cit., p. 300.

[12] Professor Wright has said of leased territories that "the governments in leased or administered territories are usually under the sovereignty of a state other than the territorial sovereign". (*Op. cit.,* p. 300.) This is a correct statement in application to Kwantung if it be understood that the rights exercised by the lessee state, under its own sovereignty, are the products of delegation by China, the lessor.

more firmly established in international law—that a state which possesses sovereignty over a given territory also has the exclusive *legal right* to exercise administrative functions in the area. What has occurred is that, in the exercise of this *legal* right, China has conferred the *actual* right to exercise jurisdiction upon the lessee, Japan. These rights of administration or jurisdiction conferred on the lessee are only confused by referring to them as "substantial rights of sovereignty".[18] They are rather substantial jurisdictional rights, exercised in virtue of the fact that the lessee is a sovereign state, but one *legally* incompetent to exercise such rights without previous delegation from the state which possesses sovereignty over the particular territory in question.

From this it follows that, even though a given state in practice exercises jurisdictional functions over a leased territory, however exclusive these governmental activities may be, the lessee state is not therefore to be considered in possession of sovereignty over the territory. Sovereignty signifies ultimate and supreme legal competence. A sovereign state, therefore, to adopt the language of Professor W. W. Willoughby, "may go to any extent in the delegation of its powers to other public bodies, or even to other States; so that, in fact, it may retain under its own direction only the most meagre complement of activities, and yet not impair its Sover-

[18] Cf. Hyde, C. C. *International Law*, Vol. I, p. 275.

eignty ".[14] Professor Willoughby's contention that sovereignty is indivisible, and that over one and the same territory only one state can possess that sovereignty, whatever its applicability to other exceptional international situations, applies with full rigor to the Kwantung leased territory. Here is a clear instance, as are also the other leased territories in China in spite of the variations in language of the lease conventions, of a situation where " the other public bodies or States, to which have been delegated the exercise of these powers, act but as the agents of the State in question, and the original State still possesses the *legal* * power, at least, of again drawing to itself the actual exercise of the powers thus granted ".[15] Under the original Kwantung or Liaotung lease convention this might have come about only upon the termination of the lease in 1923, or twenty-five years after 1898. In 1915 this period was extended in favor of Japan to ninety-nine years, or until 1997.

Whatever, then, may be the problems as to sovereignty raised by such unusual situations as mandated territories under the League of Nations, it is apparent that leased territories in China, when carefully studied, and the Kwantung lease in particular, do not furnish us with situations which compel us to revise our conception of sovereignty in inter-

[14] Willoughby, W. W. *An Examination of the Nature of the State*, p. 196. (1911 ed.)

* Italics are my own.

[15] Willoughby, *op. cit.*, p. 196.

national law as the ultimate and supreme legal competence possessed at a given time by only one state over a territory. We may conclude, then, with Oppenheim, that the principle that "on one and the same territory there can exist one full-sovereign State only" is here applicable.[16] Leased territories, particularly the Kwantung lease, "are apparent, but not real, exceptions to this rule".[17] China, the lessor state, actually exercised over Kwantung rights of sovereignty, first, in conferring specific jurisdictional rights upon Russia in 1898, again, in 1905 when China, in the treaty of Peking of December 22, 1905, with Japan, agreed to the transfer of the Russian rights to Japan, and finally, in 1915 when, by treaty and an exchange of notes with Japan, there was an agreement to extend the period of the lease to ninety-nine years.

The position of the Chinese delegation at the Washington Conference, expressed in a declaration in December, 1921, to the following effect, is essentially correct in strict law and in fact: "Though the exercise of administrative rights over the territories leased was relinquished by China to the lessee power during the period of the lease, the sover-

[16] Oppenheim, L. *International Law,* Vol. I, pp. 361-362. (1928 ed.) Dr. Hsia Ching-lin cites this quotation with approval, but adds: "In other words, so long as the lease has not expired it is the leaseholder who exercises sovereignty over the territory." (*Studies in Chinese Diplomatic History,* p. 103.) For reasons stated above, it is believed less confusing and more accurate to state simply that the leaseholder exercises *jurisdictional rights* over the territory leased.

[17] Oppenheim, p. 362.

eignty of China over them had been reserved in all cases. The leases were all creatures of compact, different from cessions both in fact and in law."[18] Throughout the present study this necessity of distinguishing sovereignty from jurisdictional rights in the Kwantung leased territory will become increasingly evident.

The fact is that, since China is the "territorial sovereign," Kwantung is Japanese territory only for the purpose of governance during the period of the lease. The importance of the lessor's sovereign rights lies, in the main, in the fact that, without such reservation, China's eventual right to recover the territory would be cut off. The Kwantung territory has not been ceded to Japan, and full title to ownership has never passed from China. Nothing but error can result from confusing this situation with so-called "condominium" or "coimperium", while to refer to the lease as a "disguised cession" is to take a superficial and popular, but untenable, position. The attempt to elucidate the status of the Kwantung lease by enlisting terminology derived from situations presumed to be analogous, but actually not parallel, has been fruitful in the past of little but confusion and inaccuracy. The international legal status of the Kwantung lease is unique; the origin, conventional basis, and *de facto* position of the Japanese rights in the territory are such that

[18] *Conference Proceedings*, p. 1060. Lauterpacht, H. *Private Law Sources and Analogies of International Law*, p. 186.

accuracy is not served by inevitably futile attempts to find analogous situations. In international law, Kwantung is *sui generis*.[19]

[19] This view is substantially in agreement with that of Dr. Léon Yang, whose doctoral dissertation has recently been published in France, this being apparently the first thorough analysis of the status of leased territories by a Chinese scholar. A quotation from this work, which has come to the writer while the present manuscript was being revised for publication, is pertinent: "Le bail entre Nations est tout uniment un bail du droit international. Baptisons-le 'Bail international', si vous voulez. Il est un phénomène nouveau, un acte juridique *sui generis* dans les rapports entre les Nations." (*Les Territoires à bail en Chine,* p. 107.)

CHAPTER II

The Original Jurisdictional Rights of Russia

1. The Conventional Basis for the Russian Rights. The legal position of Japan in the Kwantung leased territory is, in the main, the legal position of Russia before 1905, in which year, upon the close of the Russo-Japanese war, Japan obtained at Portsmouth, as ratified by China in the treaty of Peking of December 22, 1905, the transfer of the old Russian rights. The jurisdictional rights of Japan, however, now extend for a longer period than was originally conceded Russia by the lessor. The intrinsic Japanese rights of administration, however, are essentially those of the Russians before 1905.

That China forfeited to Russia in the original lease convention of 1898 practically complete rights of jurisdiction and administration, civil and military, within the Kwantung lease has apparently never been questioned by the Chinese Government. The Sino-Russian lease convention of March 27, 1898, granted to Russia the lease of the Liaotung area, since known both by the Russian and the Japanese governments as Kwantung Province, and including Port Arthur and Talien,* for a period of twenty-five years, that is, until March, 1923. The Sino-Japanese treaty and notes of May, 1915, extended

*Ryojun (Port Arthur) and Dairen (Talien), in Japanese.

the period of the lease to ninety-nine years, or until 1997. Within the leased territory, the original lease convention specifically provided that " the entire military command of the land and naval forces and equally the supreme civil administration will be entirely given over to the Russian authorities ".[1] Chinese military forces were prohibited from entering the territory, while the Russians were granted the exclusive right to erect fortifications and maintain garrisons there. From a military point of view, the only limitation upon the Russian rights was the provision whereby Chinese vessels, presumably war vessels, were permitted to use Port Arthur along with the Russian war vessels. But, inasmuch as the Russians were accorded by this agreement exclusive authority to fortify and defend the territory, it seems reasonable to interpret the exceptional grant to Chinese vessels to use Port Arthur as a corollary to the Sino-Russian treaty of alliance of June 3, 1896, which was textually directed against Japan.[2]

As for the general administrative rights obtained by Russia these may be characterized as practically exclusive and unlimited, and conferred in the general grant of " supreme civil administration " over the area. The only general limitation as to the manner of exercise of that authority by the Russians was the provision that this should be exercised by " one per-

[1] MacMurray, Vol. 1, pp. 119 ff.

[2] This was the famous Li-Lobanoff secret treaty of alliance, the authenticity of which is beyond question. For a lengthy treatment of this document see the writer's reference volume: *The International Relations of Manchuria*, pp. 253 ff.

son who, however, shall not have the title of Governor or Governor-General ". As to the jurisdiction of Russian judicial agencies within the area, Chinese subjects were to be permitted " to remove beyond the limits of the territory " or " to remain within such limits without restriction on the part of the Russian authorities ". The agreement made no exception to the exclusive right of the Russians to exercise jurisdiction in all civil cases over Chinese subjects.

In criminal cases, however, Chinese accused of crime were to be entitled to trial by the nearest Chinese authorities in accordance with Article 8 of the treaty of Peking of 1860.[3] A minor exception was also made for the single city of Chinchow.

In view of these broad and practically unqualified grants of all governmental authority to the Russian Government the limitation which can be read into the clauses reserving sovereignty to the Chinese Government can have no significance by way of operating to impair the Russian administrative and jurisdictional rights. No other interpretation can reasonably be reconciled with the blanket grant (Art. 2) to the Russians of " complete and exclusive enjoyment of the whole area of the leased territory together with the water areas contiguous to it ".[4] By the original lease convention of 1898, therefore, it appears that the Russian Government ob-

[3] The article referred to here is actually not applicable at all to such cases and was, therefore, never enforceable. (Cf. MacMurray, Vol. I, p. 120.)

[4] MacMurray, Vol. I, p. 119.

tained practically complete authority over the Kwantung leased territory for the term of the lease, which was twenty-five years.

That the Russian rights were "practically complete", instead of absolutely unlimited, is explainable by the exception, quite unimportant in practice but yet a limitation in law, which was made for the city of Chinchow in the leased territory. The original lease convention made no mention of this exception, but the additional agreement which delimited the area of the lease and established a bilateral agreement for control of administration in the so-called neutral zone lying to the north of Kwantung leased territory did make such an exception.[5] This agreement of May 7, 1898, between China and Russia provided that the city of Chinchow should be under a form of joint administration of the authorities of the two countries. The article reads:

"The Russian Government assents to the request of the Chinese Government that the Administration and police of the City of Kinchow shall be Chinese. Chinese troops will be withdrawn from Kinchow and replaced by Russian troops. The inhabitants of the city have the power to use the roads from Kinchow to the north boundary of the leased territory, and the waters usually required near the city, the use of which has been granted to Russia; but they have no power to use the sea-coast (round about)."

Chinchow had been transferred to Russian jurisdiction by the original lease convention signed in March, but this new agreement returned the city

[5] MacMurray, Vol. I, p. 127.

to Chinese civil administration, but with the right to station troops there retained by the Russians. What appears to have been the actual situation at Chinchow until 1904 was that, while this textual exception to Russian civil jurisdiction was never altered by bilateral agreement with China, the Russian authorities actually prevented the Chinese from exercising exclusive civil jurisdiction within the city. During the Boxer Rising the city of Chinchow was actually under Russian military administration. When those disturbances subsided in the late summer of 1900, the Russian Government, through Count Lamsdorff, Minister at Peking, pressed for a general agreement to regularize Russian *de facto* authority in Manchuria which included, among other things, a provision whereby the Chinese administrative rights in Chinchow would be abrogated.[6] The Chinese Government, however, never formally conceded the abrogation of this exception made in the case of Chinchow, and the alterations conceded by the Russian negotiator in March, 1901, and in the final draft of the so-called evacuation convention of April 8, 1902, left the matter of Chinese administration, as far as specific conventional agreement was concerned, exactly where it was upon the signing of the Sino-Russian agreement of May 8, 1898 pertaining to the neutral zone.[7]

[6] *China*, No. 2 (1904), pp. 7, 12, 27. *Correspondence Respecting the Russian Occupation of Manchuria and Newchwang.* (*Command Papers*, British Parliament.)

[7] *Ibid.*, p. 27; final text, p. 40; MacMurray, Vol. I, p. 326.

Whatever the textual basis for the Russian authority actually exercised at Chinchow in the leased territory—and the right to station troops there was specifically conceded to the Russians—in fact, the Chinese civil administrative authority was completely displaced during and after the Boxer Rising until the war with Japan. Chinese officials of Mukden who had nominal jurisdiction over Chinchow actually were permitted to proceed to the city only on sufferance of the Russian commissioner at Mukden, while by the autumn of 1903 Chinchow had been definitely excluded from the Chinese provincial administration of Mukden, the four deputy lieutenant-generals under the Governor-General of Mukden, having been replaced by three, the Chinchow residency having been abandoned.[8] It appears, therefore, that the Chinese authorities of Mukden actually abandoned jurisdiction over Chinchow in the leased territory.

This interpretation of the extent of jurisdictional rights granted to Russia is derivable from the terms of the original lease convention itself. The lease convention did not create an international servitude in strict law, for such leases have several charac-

[8] *China*, No. 2 (1904), p. 78; Weale, B. L. Putnam. *Manchu and Muscovite*, p. 274. "That portion of the southern part of the Liaotung Peninsula, which was leased by Russia, had been hitherto wholly subjected to Russian control, and all the machinery of legislation, administration, and jurisdiction there was provided by the Russian Government, and the same may be said of Chinchow, where the functions of Chinese local officials were practically ignored by Russia." (Takahashi, S. *International Law Applied to the Russo-Japanese War*, p. 253.)

of jurists and publicists who, at the time of the Russian occupation, expressed themselves as to the legal character of this lease, declaring it to be nothing but a " disguised cession ", would seem to have been influenced, however, by the outward appearance of the lease convention and especially by the character of the Russian occupation. That Russia had all the rights which she would have acquired if Kwantung had actually been ceded to her was true for all purposes of administering the territory, but the term " disguised cession " did not adequately account for the fact that the territory ultimately was to be recovered by China.

That it was widely presumed at the time that Russia had no intention of giving up the Kwantung lease even upon the expiration of the specified period is, of course, understandable, particularly inasmuch as the convention itself provided that the term of the Russian occupation might be " prolonged subsequently by mutual consent of both Governments ", but the presumption, strengthened by the actual status of the territory during the Russo-Japanese war, failed, because the commentators could not, in the nature of the case, anticipate subsequent developments. The early commentators failed to recognize that, in the case of such a political lease, it was entirely possible to reserve China's ultimate right to recover the territory and at the same time to allow Russia to exercise the jurisdictional rights over the territory which had been received from

China by specific waiver of her own right for a period of years.

2. *The Actual Exercise of Control by the Russians: 1898-1904.* That the Russian Government acquired the Kwantung leased territory principally for strategic purposes is well known. Both Japan and Germany, but particularly the former, were the objects of the successive steps which Tsarist policy took toward establishing a strong military position in Manchuria. That Japan was the chief object of this strategic entrenchment at Port Arthur is evident from the Russian attitude toward the annexation by Japan, in the treaty of Shimonoseki at the close of the Sino-Japanese war, of the Liaotung peninsula.[12] The lease of Kiaochow in Shantung province by Germany, however, seems to have been

[12] Count Witte, Russian Minister of Finance, who had high favor with Tsar Nicholas II, and who was to play so significant a rôle in determining Russian policy in Manchuria, felt strongly that for Japan to have a territorial base on the mainland of China, particularly in Manchuria, was a potential obstacle to his policy of "peaceful penetration" with railways and banks. He, therefore, always claimed the credit for suggesting the tripartite intervention of Russia, Germany and France which compelled Japan to sacrifice the fruits of her victory by restoring the Liaotung to China shortly after the signing of the peace treaty in 1895. (*Memoirs of Count Witte,* Ch. IV.; Dillon, E. J. *The Eclipse of Russia,* pp. 244-246.) Whether, as a matter of fact, Witte, or even Russia, was principally responsible for the initial suggestion for diplomatic intervention directed against Japan at this juncture is open to some question. (Cf. Dennett, Tyler. *Americans in Eastern Asia,* p. 635. Footnote.) At all events, Russia was no doubt wholeheartedly in support of the move, with Japan's weakening in Manchuria as the objective. (*London Times,* April 22, 1895.) (Clyde, P. H. *International Rivalries in Manchuria,* Ch. II.)

the immediate cause for Russia's demand of China for the lease of Port Arthur and Talien in the Liaotung peninsula.[18] Thus, a combination of circumstances, the potential menace of Japan in Manchuria and the immediate strengthening of the German Far Eastern position by the lease of the naval base at Kiaochow, caused Russia to demand a naval base at Port Arthur within the confines of a leased territory. But, of major significance is the fact that the treaty of alliance of 1896, between Russia and China, was textually directed against one state—Japan. The strategic object in leasing Kwantung, therefore, was most evident in the desire for a naval base at Port Arthur. The lease of such a port to Russia, if it were to be used solely as a commercial outlet for the Russian Far Eastern area, had not

[18] Count Witte, who recounted to Professor Dillon how the Tsar was tricked by the Kaiser into sanctioning the seizure of Kiaochow, credits Muravieff with urging upon the Tsar that Port Arthur be leased as a "set-off against Kiao-Chow". (Dillon, p. 249). Witte claimed to have vehemently opposed the lease of Port Arthur, but, in presenting his case to the Tsar, was met with the statement that, as an English squadron "was about to take the port", the only alternative to Russia was "to abandon it to the English" or else to "take it ourselves". (*Ibid.*, p. 250.) Witte, in his Memoirs, declared that "it is certain that by the seizure of Kiao-Chow Emperor William furnished the initial impetus to our policy. . . . . They sought to divert our forces into the Far East so as to insure the safety of their Eastern frontier." (*Memoirs*, p. 105.) While on his way to Portsmouth to negotiate the treaty of peace which followed Russia's disastrous defeat at the hands of Japan in Manchuria, Count Witte is reported to have again asserted: "Wilhelm II is the author of the war which we are on our way to America to terminate." (Dillon, p. 347.) (Cf. Baron Rosen. *Forty Years of Diplomacy*, Vol. I, p. 197.)

been opposed by Great Britain, but that government had continually opposed the lease of such a port as a naval base.[14]

The purpose of the transfer of Kwantung to Russia is stated in the first article of the lease convention of 1898: "For the purpose of ensuring that the Russian naval forces shall possess an entirely secure base on the *littoral* of northern China, H. M. the Emperor of China agrees to place at the disposal of the Russian Government, on lease, Port Arthur and Talien-wan, together with the water areas contiguous to these ports."[15] Commercial considerations were distinctly secondary to the main strategic purpose. Talien, later called Dalny—the "Far Away City"—by imperial ukase, was alone to be opened to the commerce of all nations as a free port, while the southern branch of the Chinese Eastern Railway which was contemplated in this original lease convention was obviously conceived more for its strategic relation to the Russian position at Port Arthur than for its secondary commercial significance.

Perhaps no commentator of international repute has so clearly characterized the Russian position in

[14] MacMurray, Vol. I, p. 81. *Memoirs of Count Witte,* pp. 89 ff. China, No. I (1898), p. 53. O'Conor to Salisbury, March 23, 1898. No. 125. (Cf. Clyde, *op. cit.,* Ch. IV and V.)

[15] MacMurray, Vol. I, pp. 119 ff. That Russia had threatened to use force to compel China to grant the Liaotung lease, in case of any procrastination on China's part, is evident. (China, No. 1 (1898), p. 53. MacDonald to Salisbury, March 24, 1898. No. 126.) Russia had actually occupied Port Arthur in December, 1897. The Russian demand was virtually an ultimatum, having a time limit. (Cf. Joseph, P. *Foreign Diplomacy in China,* p. 278.)

Kwantung province during those years from 1898 to 1904, as Professor T. J. Lawrence, the eminent writer on international law, who made a special study of the international legal status of Kwantung province before and during the Russo-Japanese war. His views seem to have been characteristic of less technically informed opinions expressed by many others:[16]

". . . . The powers she [Russia] exercised there, from the moment they came into possession six years ago to the outbreak of the present war, were powers of sovereignty and nothing else. She held dominion over the whole district; and accordingly when hostilities began she used it without limit or restraint for warlike purposes, and was subject in it to the onset of her foe."

This view of Professor Lawrence is well substantiated by the Russian activities within the leased territory before 1904. The territory was actually in partial occupation by Russian troops even before the signing of the lease convention. On December 18, 1897, Russian troops occupied Port Arthur on the pretext that the occupation of Kiaochow by the Germans had upset the *status quo* in the Far East. Twenty thousand Russian soldiers immediately entered the town, while the local Chinese officials were instructed to leave.[17] They began at once to fortify Port Arthur, whose harbor at the time of occupation by the Russians was ill-adapted to commercial purposes, being wretchedly small, without berthing

[16] Lawrence, T. J. *War and Neutrality in the Far East*, pp. 207-208.
[17] *Memoirs of Count Witte*, p. 101.

room and landing facilities. Port Arthur was, however, naturally well-suited for a naval base; it is almost entirely landlocked and surrounded by commanding heights well-suited for the mounting of defense guns. By 1901 the Russians were still busy with the fortification of their naval base and already torpedo boats were being constructed at the docks. "Certainly", wrote an Englishman who observed this activity from the heights above Port Arthur, "Japan might just as well sail over and try to take Gibraltar or Cronstadt as attempt to reduce Port Arthur by assault." [18] This description of the actual Russian position in the leased territory from the moment of their occupation indicates that the Russian Government not only acquired the legal right to fortify that area but actually proceeded at once to do so, and in so doing entirely replaced Chinese authority by inviting the Chinese administrative officials to leave.

The situation at Dalny was no less indicative of both the purpose of the Russians and the thoroughness of their assumption of political jurisdiction. Dalny was actually created by fiat by Russian imperial ukase on August 11, 1899. It was to be the terminus of the southern section of the Chinese Eastern Railway. It was a mushroom town, which rose almost over night when the Tsar commanded: "We deem it advisable now to proceed to the construction . . . . of a town, to which we give the name

[18] Whigham, H. J. *Manchuria and Korea*, p. 6.

of ' Dalny '." [19] No considerable trade justified the establishment of the city for commercial purposes at that time, for the native city of Talien was but a straggling fishing village with little or no seaborne traffic. A distinctly commercial purpose, however, was evident in the creation of Dalny, for it was aimed at the destruction of Newchwang and to that end it was immediately made a free port, open to the commerce of all nations, and equipped with harbor facilities which soon attracted world trade. Dalny was built by funds supplied by the Russian Government, through the Ministry of Finance, for docks, wharves, railway terminals, roads, public buildings and a harbor which had to be dredged and protected by breakwaters. " Dalny ", wrote the British visitor who had likewise observed the Russian Government's activity at Port Arthur, " is, in fact, a ' boom ' town without any reason for a ' boom ', but different in this respect that the mushroom growth is the work of a Government, which is determined to build itself a metropolis complete in every detail." [20] At Dalny, as at Port Arthur, the Chinese authorities were either entirely displaced or made subservient to the Russian authorities.

The degree of exercise of authority by the Russians in the leased territory is well illustrated by the questions which arose with Sir Robert Hart, " I. G." of the Chinese Maritime Customs, over the

[19] MacMurray, Vol. I, p. 121.

[20] Whigham, p. 8. Cf. Asakawa, K. *The Russo-Japanese Conflict*, pp. 133-134.

establishment of a branch customs office at Dalny. Every other leased territory in China had established within it by 1904 a branch of the Chinese maritime customs, but not Dalny. When Mr. Pokotiloff of the Russo-Chinese Bank at Peking proposed an appointee, a Russian, of course, for the post at Dalny, Sir Robert Hart non-commitally refrained from making any appointment at all to the post.[21] In spite of the opposition of the Chinese Government and of the foreign offices of several states, including the British and American, the Russians successfully prevented the establishment of a branch of the Chinese maritime customs at Dalny, contending that only if the entire administration of the customs office were placed in Russian hands would such be permissible.[22] The Chinese Government refused to grant such exclusive authority over the customs to the Russians, and in consequence no such office was opened in the entire leased territory during the Russian régime. This issue was concerned solely with the question of the maritime customs on dutiable commodities in transit through the leased territory to or from the interior of Manchuria, that is, beyond the borders of the leased territory. The Russian stand illustrated not only their exclusive authority within the leased territory itself, but their attempt

[21] Weale, B. L. Putnam. *Manchu and Moscovite,* pp. 79-80; Whigham, pp. 142-143.

[22] *U. S. For. Rels.,* 1903, p. 47; *U. S. Consular Reports,* April,1904. No. 283, p. 8; May, 1903, No. 272, p. 140. This situation was a subject of interpellation and criticism in the British Parliament during 1903-04. (*British Parliamentary Debates.* Fourth Series. 1903, No. 124, p. 1025. *China,* No. 2 (1904), *Command Papers,* pp. 53, 95.)

to secure control of the maritime customs beyond the jurisdictional limits of the leased territory.

As for the right to collect customs revenues within the leased territory itself, no one ever questioned the Russian authority which, under the terms of the Sino-Russian agreement for the construction of the southern branch of the Chinese Eastern Railway, dated July 6, 1898, was specifically granted to the Russian Government. "Within the leased territory on the Liaotung Peninsula Russia may fix the Customs Tariff to suit herself. . . ."[23] The Russian Government accordingly issued general regulations for control of the local customs in the one port opened to foreign trade, Dalny, dated August 11, 1899.[24]

That even before the Boxer Rising in China the Russians maintained large garrisons of troops in Manchuria, within the leased territory and railway areas at such places as Port Arthur, Harbin, Mukden and Newchwang, and beyond the railway areas, as at Kirin, is well known. The Chinese attack on Blagovestchensk, far to the north on the Amur river, which had its sequel in the unbridled retaliation of the Russians against the native Chinese populace, was a signal for a complete opening of the flood gates and the rapid saturating of Manchuria with Russian regular troops. Vice Admiral Alexeieff was at this time the commander-in-chief of the Russian forces in Kwantung province. When once the mid-summer

[23] MacMurray, Vol. I, pp. 154 ff., Art. 5.
[24] *Ibid.*, p. 121.

madness of the Chinese had subsided, Tsar Nicholas II empowered Alexeieff to negotiate an agreement for withdrawal of the Russian troops which would, at the same time, secure a more definite recognition of the right to patrol the Chinese Eastern Railway with Russian troops or railway guards. Such an agreement was, in fact, negotiated by the diplomatic commissioner, Korostovetz, who, upon instructions from Alexeieff, signed on October 27, 1900, an evacuation agreement with the Tartar General of Mukden. Previously there had been no definite conventional basis for the Russian claim of right to patrol the Chinese Eastern Railway. This agreement, though temporary in character, actually very clearly conferred that right upon the Russians, as the following translation of the original and definitive Russian text indicates:[25]

"For the protection of the railroad under construction and the maintenance of public order in the region, in Mukden and several other points in the Province, Russian troops will be stationed, to whom the administration of the Chiang Chun (Tartar-General) must show such respect and co-operation as may be necessitated, as in securing quarters, purchasing forage, etc."

[25] This Sino-Russian agreement, signed at Port Arthur, is contained in the Russian text, which is the definitive one, in B. A. Romanoff's *Russia in Manchuria:* 1892-1906, p. 267, published in 1928 at Leningrad. The text therein contained is represented as having been quoted from the original document contained in the Russian archives, and is the same as furnished by the Russian Ministry of Foreign Affairs to the Chancellery of the Ministry of Finance, Jan. 3, 1901. This new Russian work declares the text as quoted in MacMurray, Vol. I, p. 329, to be "in perfectly fantastic wording". This little known agreement was partly abrogated by that of April 8, 1902.

The Kwantung leased territory remained after the Boxer Rising under the Ministry of War, with Admiral Alexeieff as commander-in-chief of the province for purposes of general administration and control of the military, while the Ministry of Finance and its agent, the Russo-Chinese bank, had charge of the building of Dalny, the management of the railway, a flotilla of merchant steamers, some armed vessels, and handled the quasi-commercial functions of the Russian Government in the Far East. Admiral Alexeieff actually had jurisdiction under the Tsar's ordinances as far north as Tiehling on the Chinese Eastern Railway, and no foreigner could travel over that railway without his express permission.[26] This was, of course, beyond the legal rights of the Russians in Manchuria, but it was the *de facto* situation.

In 1903, by an imperial ukase dated August 12, the Tsar actually fused the administration of all the territories, formerly under the commanding officer of Kwantung province, the Governor-General of the Pri-Amur province, and the authorities in North Manchuria, by creating the Imperial Lieutenancy of the Far East with Admiral Alexeieff as the imperial lieutenant.[27] By virtue of this order the imperial lieutenant, whose headquarters were at Port Arthur, was charged with all military and civil administrative authority, was entrusted with the conduct of diplomatic relations pertaining to the Russian pos-

[26] Whigham, p. 30. Cf. Asakawa, K. *The Russo-Japanese Conflict*, pp. 133, 301.

[27] MacMurray, Vol. I, pp. 121 ff.

sessions or occupied territories in the Far East, and was charged with drafting of the ordinance laws for those territories, in all of which functions he was to be absolutely independent of any responsibility to the ministers of state and subject solely to a special "presidency" or committee created by the Tsar himself.

Consequently, when the war broke with Japan, the Russian Government exercised authority within Kwantung province, and in other areas with less legal right, much as if the territory had actually been annexed in full title and in perpetuity. The Chinese population of Kwantung had been made entirely subject to Russian authority both for purposes of administration and in legal proceedings, whether in civil or criminal cases. The indefinite provision of the original lease convention whereby Chinese accused of crime were to be delivered to the nearest Chinese authorities for trial was interpreted by the Russians with extreme liberality to suit the facts of the situation which were all in support of the Russian view that their civil and military authority over the leased territory was practically unlimited. Special agreements were signed with the provincial authorities of Heilungkiang and Kirin provinces for trial of cases involving Chinese subjects in the railway areas but none were ever applied to the leased territory, the Chinese population being thus made subject to Russian jurisdiction.

CHAPTER III

War, Neutrality and the Leased Territory

The Russo-Japanese war showed conclusively that for all purposes of war and neutrality the Kwantung leased territory was regarded, both by belligerents and neutrals, much as if the territory were actually an integral portion of the Russian empire. Manchuria, as a whole, was not generally so regarded, though criticism appearing especially in the American press at the time, directed against what was alleged to be a violation of Chinese neutrality by the Russians in Manchuria, was, in the main, ill-founded in international law. Except for the territory west of the Liao river, the Russian troops were, at the outbreak of the war, in practical military occupation of the railway, the towns situated thereon, and the principal *points d'appui* of the trade arteries.[1] The status of Manchuria during the Russo-Japanese war was, if not unique in international relations, at least very exceptional.[2] Here was a war

[1] "The status of Manchuria was one of double or ambiguous sovereignty which is closely analogous to that of a territory or district under military or belligerent occupation." (Hershey, Amos S. *The International Law and Diplomacy of the Russo-Japanese War*, p. 253.)

[2] *Ibid.*, p. 250. Professor Hershey quotes Hall to the effect that "the belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the state *de facto* exercising permanent military control

which on land was fought entirely on the soil of a neutral state—with the exception, of course, of the engagements in the leased territory around Chinchow, Dalny, and Port Arthur, a territory which was " Chinese soil " only in the sense that China still retained sovereignty over it without the right to exercise it.[8]

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within it". There is, however, serious objection to the use of the term " double sovereignty " generally, or as applied here to the status of Manchuria. Sovereignty, both in Manchuria generally and in the Kwantung leased territory, was retained by China alone, as today. As subsequent chapters here will demonstrate, it is quite possible for a sovereign state to divest itself of practically all administrative or jurisdictional right in a given territory and still retain sovereignty over it. Sovereignty is not measured by the extent of the exercise of jurisdiction, nor is the term to be confused with jurisdictional authority as such. No legal situation illustrates this more clearly than a political lease.

[8] By far the most accurate and informative account of the belligerent status of Manchuria during this struggle is that to be found in the monumental work by Dr. S. Takahashi, one of the most eminent of Japanese international legal publicists, a professor of international law in the Imperial University of Tokyo, and, during the war, legal adviser to the Japanese Foreign Office. From his volume, written in 1908, it may be well to quote *in extenso*.

" Manchuria was under the sovereignty of China, which was neutral during the Russo-Japanese war, and hence Manchuria was neutral territory. But before the outbreak of the war, Manchuria was occupied by Russia, and was entirely under her authority. The expulsion of the Russian troops from the three provinces of Manchuria was the principal object of Japan in beginning the war, which was carried on *de facto* in Manchuria. Thus Manchuria came to be occupied by the Japanese, who drove out the Russian troops.

" Taking these facts into consideration, it might be said that the occupation of Manchuria was an unique case, different from what is called military occupation of hostile territories in International Law. But the fact that China recognized a portion of her territory as the area of fighting implies that her consent to military operations by

From the Russian point of view, Russia was within her rights, therefore, in declaring Manchuria a belligerent territory. Russia had large vested proprietary interests in the Chinese Eastern Railway areas, in addition to the Kwantung leased territory, and the right to use the railway to transport Russian troops was explicit in the Russian treaty of alliance of 1896 with China. Japan, by the same token, was within her rights in attacking the Russian troops in Manchuria. The war was fought largely on Chinese soil in Manchuria, but at an early stage of the conflict the Chinese Government, by definitely excluding Manchuria from the application of China's proclamation of neutrality, waived all legal right to interfere with the belligerency of the contestants in Manchuria. Prince Ch'ing, in reply to Secretary John Hay's communication of February 10, 1904,

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belligerents in her own territory was given. And as a form of military operation, the act of occupation is naturally included in this recognition. Consequently the belligerents must be understood as both being privileged to take action similar to those of any common military occupation, on account of the needs of the army as well as of the necessity of securing peace and good order in the occupied territory." Dr. Takahashi then presents reasonable grounds, since Manchuria was the territory of a neutral state, to justify the conclusion that not all articles of the Hague Convention of 1899 were applicable. (*International Law Applied to the Russo-Japanese War*, pp. 250 ff.)

Professor F. de Martens, the Russian authority, in an article written during the Portsmouth peace conference, after commenting upon the intensity of the struggle on the Manchurian plains, and noting that the war was fought, for the most part on territory of a neutral state, makes this striking assertion: "Never before, in the history of the civilized world, has a war been conducted under such conditions." (*North American Review*, Nov., 1905, p. 648.)

inquiring as to the area within which the Chinese Government would preserve their neutrality, asserted that China's declaration of neutrality did not apply to any part of the territory in Manchuria which was actually under occupation by Russian troops.[4] Consequently, Viceroy Alexeieff during February issued a proclamation in which he acknowledged for his government that the occupied territories in Manchuria were effectively under Russian military control, that Chinese civil administrative rights remained unimpaired, and that Russia would assume full responsibility of a belligerent over such territories.[5] When the Japanese armies, after driving out the Russians, took temporary military possession of these same areas the Japanese Government assumed similar responsibilities.[6]

[4] *U. S. For. Rels.*, 1904, pp. 120 ff.

[5] *Ibid.*, pp. 126-127.

[6] In "Regulations Governing the Administration of Liaotung Garrisons", the Japanese military issued special rules for the Kwantung leased territory and for "the territory lying outside the land leased by Russia": Within the latter, special military commissioners were to take charge of matters arising under belligerent rights, while Chinese local authorities were to retain control of all civil administrative matters not contrary to military necessity. (Cf. Takahashi, *op. cit.*, pp. 254-256).

Professor T. J. Lawrence, writing during the war itself, described the international legal status of Manchuria during the conflict as follows:

"Two facts are undeniable, and those two facts rule the situation. The first is that Manchuria is still in law a portion of the Chinese Empire. The second is that the troops of Russia hold the greater part of it, and within that part her officers exercise full authority. Now there is no part of the international law of war more clear, and none more generally accepted, than the principle that when the armed

What applied to Manchuria generally, applied the more so to the Kwantung leased territory. The leased territory was not only occupied by Russian troops as a *de facto* situation, but their presence there was with the explicit sanction of the Chinese Government in the Liaotung lease convention of 1898. Russia, under that agreement, had been permitted to erect fortifications there. Port Arthur was both their naval base in southern Manchuria and a point of concentration for the Russian armies. There can be no question, then, but that the Kwantung leased territory was entirely outside the territory over which the Chinese Government undertook to preserve their neutrality; this was explicit in the Chinese declaration. In the communications which passed between Secretary John Hay and the Chinese Government concerning China's neutrality there is evident the tendency to take for granted that the Kwantung leased territory could not be considered as territory over which China had any responsibility as a neutral in the conflict.[7]

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forces of a state hold a territory not her own in firm possession, so that they can exercise their authority at will in any part of it, they possess over that territory and its inhabitants certain wide rights, called the rights of occupancy, and these rights remain as long as the fact of presence and control on which they are based remain. They apply to any foreign territory firmly held for warlike purposes, no matter how the tenure originated. . . . . No one denies that the outbreak of the war found Russia in full control of all but the southwestern portion of Manchuria, but few recognize the importance of the legal consequences that follow." (*War and Neutrality in the Far East*, pp. 286-287.)

[7] *U. S. For. Rels.*, 1904, pp. 120 ff. The prevalent conception of the

The actual status of the leased territory during the war was practically identical with such Russian territories as the Pri-Amur province, including Vladivostok, with a technical difference of minor importance, which is this, that when the Japanese forces eventually occupied the leased territory they took care to follow the Russian precedents in exercising military administration over it. Thus, for example, the Japanese military regulations made applicable to the leased territory, as it became progressively occupied by their troops, were distinct in certain particulars from those made applicable to territory outside the lease.[8] But, just as the Rus-

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that they were to be properly described as "disguised cessions". Although this conception is by no means adequate, since these leases in China were not properly termed cessions at all, all of the publicists who regarded these territories as such naturally conceded that, for all purposes of war and neutrality, such a lease as the Kwantung territory was to be regarded as as much the territory of the lessee state as if it had been actually annexed in full sovereignty and perpetuity. This was especially the view of French publicists. (Cf. "Territoires cédés à bail en Chine", *Revue générale de droit international public*, Vol. XV, 1908. pp. 174-175; Perrinjaquet, J. *Des cessions temporaires de territoires*, pp. 255 ff.; Gerard. L. *Des cessions déguisées de territoires en droit international public*, pp. 285 ff.; de Pouvourville, A. "Les fictions internationales en Extrême-Orient", *Revue générale de droit international public*, Vol. VI, 1899, pp. 118 ff.).

[8] Professor S. Takahashi, therefore, rightfully distinguishes between the rights of military occupancy of the Japanese in Manchuria generally and in the leased territory. Of the latter, he wrote:

"That portion of the southern part of the Liaotung Peninsula, which was leased by Russia, had been hitherto wholly subjected to Russian control, and all the machinery of legislation, administration, and jurisdiction there was provided by the Russian Government, and the same may be said of Chinchow, where the functions of Chinese local officials were practically ignored by Russia. Administration

sians had been legally permitted by China to fortify Port Arthur and use the leased territory for military purposes without restriction, so that territory, after the enemy belligerent had been expelled, fell under the authority of the Japanese for purposes of military occupation.

Immediately upon the outbreak of hostilities the Japanese Government, through their consul at Chefoo, and with the assistance of foreign vessels, removed all Japanese subjects from Port Arthur and the leased territory, just as they were compelled to remove from Siberia and the Pri-Amur province. Three months later Vice-Admiral Togo (May 26, 1904) issued a declaration of blockade of the Liaotung peninsula, which included the leased territory.

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of the Russian lease (Chinchow included) should have been assumed entirely by the Japanese Government, partly because that portion of territory had remained hitherto entirely in Russian control, and partly because her rights required to be firmly planted there." But Dr. Takahashi adds a sentence which, while supportable by the former Japanese official interpretation of the international legal status of the leased territory, was not supported in strict law by other foreign states. "The same right, however, being based merely on the fact of occupation, and not authorized by any special treaty, any foreign criminal found within the same territory should have been handed over to his own consul to be properly dealt with." (Takahashi, *op. cit.*, p. 253.) Japan alone maintained before the war that the rights of foreigners, under their extraterritorial treaties with China, should apply to the Kwantung leased territory. There is this to be said for his view, however, that Japan only possessed the rights of military occupancy, not of conquest, for Japan later recognized that China's consent to the transfer of the lease to Japan was necessary. It is reasonable to conclude, however, that Japan's rights as military occupant there were different in kind from those elsewhere in Manchuria.

This was immediately made effective, particularly as against Chinese junks carrying contraband, until it was lifted upon the capture of Port Arthur by the Japanese forces on January 7, 1905.[9] Japan thereupon acquired all the rights of military occupancy and exercised them until they were regularized by the armistice and the treaty of Portsmouth, and the approval of the Chinese Government to the transfer of the Kwantung leased territory to Japan, given in the treaty of Peking of December 22, 1905.

The view of certain writers that the Kwantung leased territory, or the other leased territories in China, should be regarded as " quasi-neutralized " or " exempted from hostile attack ", or that " they have been permanently neutralized between China and the lessee states ",[10] is neither supportable by the *de facto* occurrences of the Russo-Japanese war, the views of the recognized publicists who have written to the point, nor by the declared attitude of the

[9] Takahashi, *op. cit.*, p. 359.

[10] Cf. Tyau, M. T. Z. *Legal Obligations, etc.*, p. 75; Hsia, Chinglin, *Studies in Chinese Diplomatic History*, pp. 110-113; Bau, M. J. *Foreign Relations of China*, p. 333. (1st ed.) The latter goes so far as to contend that " in time of war between the lessee state and other states, the lessee state must observe neutrality in the leased area and retain the territories only on condition of quiet enjoyment ". Here is a phrase evidently drawn from the private law of lease of real property—which suggests that the conclusion has been drawn from the presumed analogy of political leases with private law leases, or leases in municipal law. A criticism of this analogy follows in another section.

Chinese Government during the war itself.[11] The Chinese Government, as has been said, did not claim that the Kwantung leased territory should be regarded as neutral or "neutralized" territory. Particularly would this have been inconsistent in the case of Kwantung for China's consent to the fortification of Port Arthur had been explicit, and, especially in a war where Russia was a participant—China being an ally under the terms of the alliance of 1896—it would have been manifestly absurd for any foreign state, enemy or neutral, to regard the Kwantung leased territory as other than subject to attack by the enemy.[12]

[11] To this point Professor T. J. Lawrence has written with exceptional clarity and definiteness:

"She [Russia] held dominion over the whole district; and accordingly when hostilities began she used it without limit or restraint for warlike purposes, and was subject in it to the onset of her foe. It is worthy of remark that, though she denounced Japan's first attempt on Port Arthur as treacherous, she never maintained that the place, and the leased territory generally, were free from attack, as being under the sovereignty of China and therefore neutral ground. There can be no doubt that the whole world looks upon Port Arthur and Dalny as Russian territory; and unless the whole world is wrong, Russia was right in filling the district and its waters with troops and warships and Japan was right in doing her utmost to destroy or capture them." His conclusion appears correct, but, as will appear later, Professor Lawrence was wrong in assuming that the leased territory was adequately to be called "Russian territory". He, like most writers of the time, was inclined to forget that China's sovereignty meant something real, and was accustomed to refer to the lease as a "disguised cession"—which it was not. (*War and Neutrality in the Far East*, pp. 273-274.)

[12] John Westlake was in full agreement with Professor Lawrence as to the position of leased territories, holding that they are subject to attack by the enemy of the lessee state in time of war. (*Inter-*

That this leased territory should have been regarded at the outbreak of the Russo-Japanese war as Russian territory for all purposes of war and neutrality was entirely in accord with the realities of the situation, and with the attitude of the German Government with respect to their own political lease at Kiaochow. After the memorable naval engagement of August 10, 1904, six Russian warships fled into Kiaochow. On the representation of the Japanese Minister at Berlin, the German Government instructed the Governor of Kiaochow that, in future, belligerent vessels entering the harbor should be permitted twenty-four hours to take on coal necessary to clear the harbor, but if any ship refused to leave after that time it was to be disarmed and held by the authorities.[13] These Russian warships, being partly disabled, were forthwith disarmed at Tsingtao. Germany, not China, but with the specific approval of the Chinese Government as communicated to Japan, assumed the full responsibility for maintaining the status of the Kiaochow leased territory

national Law, Pt. 1, pp. 133-134. Cambridge, 1910.) F. E. Smith (Earl of Birkenhead) and N. W. Sibley fail to deal at all adequately with the anomalous status of Manchuria and that of the Kwantung lease during the Russo-Japanese war. (*International Law as Interpreted during the Russo-Japanese War.*)

[13] It is interesting to note that Professor Franz von Liszt, an eminent German professor of international law, strongly urged the adoption of the 24-hour limit by neutrals, and published in the *Deutsche Juristen Zeitung* an article in which he stated that the German Chancellor had enforced at Tsingtao the very principle the professor had so strongly advocated, as a correct principle of international law. (Takahashi, *op. cit.*, p. 448.)

as neutral territory. Thus, in addition to the precedent established in the Kwantung leased territory during the Russo-Japanese war, there was also the precedent of Kiaochow, both of which were regarded by belligerents and neutrals, including China, as within the jurisdiction of the lessee state for all purposes of war and neutrality.

The practice of international law applying to leased territories during the Russo-Japanese war, therefore, furnished adequate precedent for the attack of Japan upon Tsingtao during the World War, at least from a strictly juristic view of the relation of the Kiaochow leased territory to the German Government. However much the carrying of hostilities into these leased territories, over which China retains sovereignty with the ultimate right to recover them completely, must produce inevitably most unfortunate circumstances for the innocent Chinese populace within them, and however much, as a matter of comity toward China, policy should dictate that the lessee states refrain from using them as principal bases of military and naval operations, it is evident that these leases were created largely for the very purpose of giving the lessees military strongholds on the China coast, and, in strict law, they are as subject to the onslaught of the enemy, should war break out, as the lessee's native soil. In passing, particularly to correct a very prevalent impression outside of the Far East, it is worthy of remark that Port Arthur is *not* today a fortified

naval base of Japan, although it is within a zone designated as strategic.[14] So also, for that matter, is Dairen.

[14] The Japanese Government have taken the position that the responsibility for maintaining the neutral status of the Kwantung leased territory in time of civil war in China rests upon Japan. During 1927 certain Chinese warships, belonging to the northern Chinese coalition against the Nanking Government, were undergoing repairs at the Manchuria Dock Company's repair docks at Port Arthur. In reply to a protest of the Chinese Government, the Japanese Foreign Office and the Kwantung Government held that Japan was observing neutrality in the case; that the Manchuria Dock Company was a private concern which showed no discrimination between opposing factions in China which might wish to have ships repaired at Port Arthur; and that no state of belligerency had been recognized for the northern coalition. (*Manchuria Daily News,* May 19 and 23, 1927.)

CHAPTER IV

The Acquired Jurisdictional Rights of Japan

1. The Nature of the Japanese Rights. By virtue of the treaty of Portsmouth and the Sino-Japanese treaty which followed on December 22, 1905, all of the Russian rights within the Kwantung leased territory were transferred to Japan. Japan, in thus acquiring the former Russian jurisdictional rights in the leased territory, together with the other railway and mining rights conceded at the same time, not only obtained the Russian rights but acquired the responsibilities as determined by the various bilateral agreements between China and Russia from 1895 to 1904. The treaty of Portsmouth (September 5, 1905) provided in one all-embracing article (Art. 5) with respect to the leasehold: [1]

"The Imperial Russian Government transfer and assign to the Imperial Government of Japan, with the consent of the Government of China, the lease of Port Arthur, Talien and adjacent territory and territorial waters and all rights privileges and concessions connected with or forming part of such lease and they also transfer and assign to the Imperial Government of Japan all public works and properties in the territory affected by the above mentioned lease."

The same article stipulated that to validate this transfer the Japanese Government would have to obtain the consent of China, although the original

[1] MacMurray, Vol. I, pp. 522 ff.

lease convention had not, as in the case of the Kiao-chow lease convention, specified that the leased territory was non-assignable by the lessee. China's consent, however, was obtained to this and the other transfers of the treaty of Portsmouth by the Sino-Japanese treaty of Peking of December 22, 1905.[2] The agreement was signed by Baron Komura, after his return from Portsmouth, and by Yuan Shih-k'ai, then Viceroy of Chihli province, as well as by other plenipotentiaries. In one succinct article (Art. 1) China consented to the transfers in these words: "The Imperial Chinese Government consent to all the transfers and assignments made by Russia and Japan by Articles V and VI of the Treaty of Peace above mentioned." The other article provided that, both in regard to the leased territory and the railway rights, the Japanese Government, according to the English version of the Japanese text, would "so far as circumstances permit, conform to the original agreements concluded between China and Russia". According to the Japanese text, questions of interpretation should be decided by the Japanese Government "in consultation with the Chinese Government".[3] But no great problem of interpreting this

[2] MacMurray, Vol. I, pp. 549 ff. Textually, the Kwantung lease was not declared to be non-transferable or non-assignable to a third state, but the fact that Japan, acting on the urging of the Russian delegates at Portsmouth, agreed to obtain China's consent to the transfers there made to Japan may be taken as an admission that the Kwantung lease cannot be assigned to a third party without the consent of China.

[3] MacMurray, Vol. I, pp. 522 ff. The Chinese text, however, gives a somewhat different version of this article. (Cf. *Yüeh Chang Hui Yao* [*A Collection of Treaties*, etc.], Vol. I, pp. 121-123. 2 vols.,

treaty, in so far as it had application to the leased territory, has ever arisen: the importance of the question of interpretation has arisen rather in connection with the jurisdictional rights of Japan in the South Manchuria Railway areas.

Recalling, then, the exceptions made in the original Liaotung lease convention to the exercise of exclusive administrative and jurisdictional authority by Russia in the leased territory—the case of Chinchow, the Chinese right to use Port Arthur and Dalny (Dairen) for their war vessels, and the provision that in criminal cases against Chinese residents the accused were to be turned over " to the nearest Chinese authorities "—what is evident is that the exceptions were so insignificant in themselves as to be quite unimportant for all practical purposes, and that these very exceptions serve to prove the rule

June, 1927, Mukden. Official Publication of The Foreign Intercourse Office, in Chinese.) Dr. Hsü Shu-hsi gives this translation from the original Chinese text, which is a correct rendering of the intent of this article: "Article II. The Government of Japan engages to earnestly observe the original agreements entered into between China and Russia respecting the lease and the construction of the railway, and to promptly consult and determine with the Government of China as matters come up in the future." (*Problems of the Pacific*, 1929, p. 473.) The intent of this article, as evidenced by the Chinese text, was not to concede to Japan any arbitrary or prior right to place a unilateral interpretation upon the mooted problems to arise out of this treaty's application. A reasonable interpretation of this question would, of course, give equal authority to the Chinese Government. It is, however, significant that this treaty was drawn only in the Chinese and Japanese languages, a departure from the former practice of Japan in agreements with China. (*U. S. For. Rels.*, 1906, Pt. I, p. 996.)

which was that within the Kwantung leased territory the Russian political authority, during the period of the lease, was practically unimpaired. Russia had acquired, to repeat, " the entire military command ", together with " the supreme civil administration " of the leased territory within which she was to have " complete and exclusive enjoyment of the whole area . . . . together with the water areas contiguous to it ".[4]

These clauses can hardly be interpreted as other than granting the lessee practically unlimited ad-

[4] The geographical extent of the Kwantung leased territory was approximately 1,300 square miles, including coastal islands, the confines of the territory having been defined in the supplementary agreement of May 7, 1898. This was to include, then, the area lying south of a line drawn roughly from the west coast of the peninsula, from a point on the north side of Yatang bay to a point on the north side of Pitzuwo bay. A special area, lying to the north of the leased territory, was designated a " neutral zone " over which the Chinese Government was to exercise full jurisdiction, but Russia (later Japan) was to be entitled to certain exclusive concessionary rights therein. No troops were to be despatched there by either party without the consent of the other. No important problems have ever arisen concerning this matter of the " neutral ground " north of the leased territory. On several occasions both the Chinese and Japanese have sent troops to the area to suppress banditry or civil disorder, and have followed the practice of first informing the other. For example, in September, 1911, when this area was the scene of disturbances caused by certain disaffected Chinese elements, the Chinese Government applied to Tokyo through the Japanese Minister in Peking for permission to send Chinese troops to quiet the area. The Japanese Government immediately gave their consent, and Chinese troops were sent to the " neutral ground ". Later in the year, similar riots broke out, under the direction of Chinese revolutionaries. Again permission was asked of Japan, and Chinese troops were sent there with Japanese consent. (*Manchuria Daily News*, Sept. 12, Dec. 28-30, 1911.)

ministrative and jurisdictional rights in the leased territory. The *de facto* interpretation of those clauses under the Russians, during their period of administration of the Kwantung territory between 1898 and 1904, served to establish precedents which Japan might have been expected to follow, while China's non-assumption of neutral rights over the territory during the Russo-Japanese war gave further strength to the interpretation that Japan obtained with the lease itself in 1905 practically exclusive rights of administration and jurisdiction over the territory. The minor exceptions, however, are interesting in themselves, and although some attention should be given them, the facts relating to them should not detract from the general interpretation presented above.

One of these minor exceptions to the exclusive right of Russia to exercise political authority over Kwantung was that Chinese war vessels were to be permitted to use the harbors of Port Arthur and Dairen. This may be interpreted as a corollary of the Sino-Russian treaty of alliance of 1896, which had been directed explicitly against Japan. The substance of this treaty of alliance seems to have been well understood by the Japanese Government as early as 1897, but the official text itself had been kept secret until many years later. Port Arthur had been made a naval base by China before the lease convention. As China's naval strength was known to be inconsequential, the inclusion of this exception in

the lease convention appears to have been merely a polite and meaningless bit of *largesse* from Russia. It might also be argued that China lost what right she had to use these ports by refraining from coming to the aid of her ally during the Russo-Japanese war. Yet it might be argued, in strict law, that the acquisition of the lease by Japan revived China's right to use the harbors mentioned. As a matter of fact Chinese war vessels have frequently entered Port Arthur for repairs, as in 1927. A reasonable conclusion as to this exception today would seem to be that Chinese war vessels still retain the right to enter these harbors, now under Japanese control, but that such entry must be for purposes and with attendant circumstances which would not constitute a potential menace to the security of the lessee.[5] This exception, as far as having any bearing on Japanese rights in the Kwantung leased territory, is inconsequential.

Another minor exception to the general grant of authority to the lessee state was that Chinese residents were to be permitted trial, when accused in criminal cases, by the "nearest Chinese authorities". This was a sort of "extraterritorial" grant of authority to the Chinese to permit the removal of

[5] Port Arthur, as has been noted in a previous section, is no longer a naval base of Japan, and there is none in the leased territory. In March, 1914, Port Arthur was reduced to the status of a naval depot, and in November, 1922, to a coast guard station. In April, 1925, this coast guard station was abolished and, Port Arthur is now an ordinary port—commercially of no significance. (*A Brief Sketch of the Kwantung Government*, p. 8.)

such cases from Russian, therefore, Japanese jurisdiction.[6] This specific exception to the exercise of Russian jurisdiction over Kwantung became a dead letter in practice during the Russian period of administration. All Chinese officials were removed from the territory after 1903 when the local deputy residents were withdrawn from Chinchow. No specific statement of procedure to accomplish such removal of cases from the jurisdiction of the lessee state had ever been made, and, in any event, the resulting indefiniteness was such that the Russians naturally assumed the exception to be of little consequence. Had Chinchow remained under Chinese civil administration during the period of Russian occupation the procedure in handling criminal cases in which Chinese were the accused might have been very different, though it is difficult to see how anything but confusion would have resulted from the attempt to separate civil and criminal cases, particu-

[6] MacMurray, Vol. I, p. 120. Art. IV. ". . . . Chinese inhabitants retain the right, as they may desire, either to remove beyond the limits of the territory leased by Russia or to remain within such limits without restriction on the part of the Russian authorities. In the event of a Chinese subject committing any crime within the limits of the leased territory, the offender will be handed over to the nearest Chinese authorities for trial and punishment in accordance with Chinese laws, as laid down in Article VIII of the Treaty of Peking of 1860." (Lease Convention of March 27, 1898.) According to the Russian Government, this article is not correctly translated as above. The Russian legation informed Minister Conger in Peking in 1899 that "that provision is not correctly translated" and "that construing it in connection with Article VIII of the treaty of 1860 they [the Russian Government] have the right to try Chinese for crimes committed against Russians". (*U. S. For. Rels.*, 1900, p. 385.)

larly when the lessee state was specifically granted control of all military and police agencies within the area.[7]

The Japanese administrative authorities in Kwantung province have quite naturally followed the Russian precedent in this regard, and, although in strict law, and in the absence of a special agreement between China and Japan on this subject, altering the situation established by the original lease convention of 1898, the Chinese Government technically still retain the right to require the fulfilment of this clause exempting Chinese from criminal procedure when they are defendants. Under present circumstances it would be patently impossible of application.[8] There are no Chinese officials, responsible to Chinese authority, in the leased territory. For the Japanese to make arrests in all cases, petty or flagrant, and turn the accused over to Chinese

[7] Professor G. W. Keeton in a recent work notes this exception, merely quoting the original lease convention, but concludes: "Russian jurisdiction in the Kwangtung Peninsula ceased after the Russo-Japanese War. Under Japanese rule, Japanese courts alone have jurisdiction." (Because of the constant confusion of the name "Kwantung" with "Kwangtung", the Chinese province of Canton, his spelling here should be corrected. This confusion is even more common than the all too frequent "Darien" for Dairen"!) Professor Keeton draws attention to somewhat parallel situations at Kowloon, Weihaiwei and Kiaochow, although he notes the truth that there are distinct textual variations in each of these cases. (*The Development of Extraterritoriality in China,* Vol. I, p. 307.)

[8] As previously noted, however, the Russian Government in 1899 claimed that the current English text of the 1898 lease convention was incorrectly translated, and that the Russian authorities were entitled to try Chinese accused of crime in the territory. (*U. S. For. Rels.,* 1900. p. 385.)

authority, without any means provided for enforcement of such judgments as might be handed down by a Chinese court, say at Liaoyang or Mukden, would result in nothing but constant friction, and circumvention in practice.[9]

The third minor exception to exclusive civil and military authority of the Russians, as provided for in the original lease convention, was the case of Chinchow. This exception was made in the special agreement of May 7, 1898, which provided for the geographical delimitation of the boundaries of the leased territory and of the "neutral ground" lying to the north.[10] What the exact intent of this exception was, it is impossible to say with complete definiteness, as the agreement itself is silent on the point. It appears, however, that this was an exception conceded by the Russians solely to permit the local Chinese officials in Chinchow to exercise a limited degree of municipal authority in the city only, and that this, as explicit in the agreement, was to be reconcilable with the Russian right to replace the Chinese troops with Russians.[11] It is evident that the original justification for excepting Chinchow may not apply today, for while Chinchow was in 1898 the only town of

[9] Another minor exception to the exclusive authority of the lessee state was this, that the highest official should "not have the title of Governor or Governor-General". The exception has no practical significance. The Japanese today claim that the characters used to denominate the "Governor", i. e., *Chokan* in Japanese, or *Chang Kuan* in Chinese, are legitimate under the meaning of the convention of 1898.

[10] MacMurray, Vol. I, p. 127.

[11] *Ibid.*, p. 137.

considerable size in the leased territory, today it has become of only minor importance when compared with Dairen—a city of over a hundred thousand population—or Port Arthur. Furthermore, the realities of the situation would make resumption of any Chinese authority over Chinchow quite impossible. This city is as much an integral part of the leased territory as any of the half dozen villages to the north of it, all of which lie within Japanese jurisdiction. As a working arrangement it would be quite impracticable for the Chinese to exercise any administrative authority in this city without having additional police authority, which, under the Russian text of the original boundary agreement, was clearly granted to the Russians.[12] Furthermore, Chinchow

[12] Japanese officials in Dairen hold that the translation of this article of the agreement (May 7, 1898) as given in MacMurray's treaty collection, is not a proper rendering of the Russian text, in that it should read "system of municipal autonomy" instead of "administration and police". The Japanese hold that whatever form of local Chinese administration were to be established in Chinchow, the intent of the agreement of 1898 was to make such a system subordinate juridically to the government of the lessee state. That this interpretation of the Russian text is entirely accurate is open to some doubt. At the outset, it is quite clear that the Russians did permit the Chinese to exercise municipal jurisdiction in Chinchow. In 1900, for example, numerous difficulties arose as to the interpretation of this confused article because Chinese were admittedly subject to Russian jurisdiction outside the walls of the city, but when they entered the walled city they were at that time under Chinese administration. (Cf. Hosie, A. *Manchuria*, p. 79.) Furthermore, this difficulty caused so much confusion that the Russians made a request for "abolition of Chinese administration in the town of Chinchow" in February, 1901—thus admitting technically that Chinese retained municipal jurisdiction there. (*China*, No. 2, *Russian Occupation of Manchuria and Newchwang. Command Papers*, 1904, p. 7.) The Rus-

is situated on the South Manchuria Railway, which, within the leased territory is, without question, subject to police by the authority of the lessee state.

It does not appear that the Chinese Government has ever made any serious effort to recover any form of adminstrative authority over Chinchow since Japanese assumption of authority in 1905. For a quarter century the Japanese have exercised complete civil and military authority over the city. It is believed that any attempt of the Chinese Government to recover this exceptional authority over Chinchow, which has, in practice, lapsed since 1903, would meet with no success, in part because the agreements clearly prevent the Chinese from exercising police or military authority within the city itself.

2. Japanese Jurisdiction over Chinese Residents. Several interesting questions may be raised with re-

sians proposed a new agreement at this time with respect to Manchuria which contained a clause to the following import: "China's autonomous rights in the city of Chinchow, secured to her by Article 4 of the Special Agreement of May 7th, 1898, are hereby abrogated." (*Ibid.*, p. 12.) The proposed agreement was not accepted by the Chinese, and this article was later expunged in the alterations of March and August, 1901, and was, therefore, not included in the final ratified agreement of evacuation of April 8, 1902. (*Ibid.*, p. 36; MacMurray, Vol. I, p. 326.) Nevertheless, the Chinese withdrew their deputy-resident from Chinchow in 1903. (Weale, Putnam. *Manchu and Muscovite*, p. 274.) It is interesting to note that Professor S. Takahashi presents evidence that the Japanese military authorities during the Russo-Japanese war, upon occupying the Kwantung leased territory, recognized technically that Chinchow had a status separate and distinct from the rest of the territory, and that the legality of the assumption of jurisdiction over Chinchow by the Japanese was based entirely upon the *de facto* situation and the precedent set by the Russians. (*International Law Applied to the Russo-Japanese War*, pp. 252-257.)

spect to the status of Chinese residing in the Kwantung leased territory under Japanese jurisdiction. In practice Japanese authority is complete over Chinese residents, even as over Japanese. As will appear later, foreigners residing in the leased territory are not subject to such privileges by way of immunity from trial in Japanese courts as were provided for them under their extraterritorial treaties with China. The Japanese have from the beginning exercised complete jurisdiction, in both civil and criminal cases, over Chinese residents, who, under the original 1898 lease conventions are definitely subject to the administrative authority of the lessee state. When the Japanese proceeded, after 1905, to establish a civil administrative system for Kwantung province, Russian precedents were followed, and no subsequent agreement with China since that time has altered this arrangement.

Chinese residents in the leased territory have been treated, therefore, under Japanese law applicable to the province, as subject to Japanese jurisdiction quite as much as if they were Japanese nationals—which, in law, they are not. Chinese residents are subject to essentially the same judicial procedure, and are under the same court system, as Japanese residents, though the law applicable to the Chinese, in both civil and criminal cases, varied, especially in the early years of Japanese control. The portions of the Japanese civil and criminal codes which by imperial ordinance have been made applicable to Kwantung province have been amended to make them

more suitable in their application to the Chinese whose customs and legal practices are variant from those of the Japanese.[18]

Another perhaps interesting commentary on the status of Chinese residents in the leased territory is that, not only are such residents permitted freely to reside there, but Chinese immigrants are permitted to enter the territory and settle within it permanently. Furthermore, no passports are required for Chinese passing through the territory from other parts of China, an arrangement provided for by an

[18] In land title cases, for example, where Chinese legal concepts differed from the Japanese, separate laws and procedure were applied to them. (Mochizuki, K. *Civil Administration in the Kwantung Government,* pp. 13-14, 1910.) But in criminal cases, except for minor variations presumed to be more in accordance with Chinese ideas and practices of justice, Japanese substantive law and procedure came to be applied theoretically without distinction between Japanese and Chinese. (Asakawa, K. *Yale Review,* Nov. 1908, pp. 270-271.) In this the Japanese consulted precedents at Kiaochow and Singapore. It should be made clear here that no attempt is made anywhere in this study to pass judgment on Japanese administrative *policy,* or to describe the administrative system as such. This is a study of jurisdictional authority.

The following ordinances specifically concern the law and procedure in civil and criminal cases involving Chinese residents of the Kwantung leased territory. A fundamental Imperial Ordinance, No. 213, 1908, pertaining to "Court Procedure in Kwantung" (Arts. 1 to 3, and 77.) An Imperial Ordinance, No. 236, 1908, relating to "Administration of Fines and Corporal Punishment". The following Kwantung Government ordinances: No. 51, 1908, Regulations for the Enforcement of Imperial Ordinance No. 213, 1908; No. 57, 1908, Regulations for the Enforcement of Imperial Ordinance No. 236, 1908; No. 274, 1919, Rules for Summary Sentences; No. 25, 1907, Regulations for Sentences to Fines and Detention. On August 1, 1924, a new civil code was made applicable to Kwantung province, over Chinese as well as Japanese, requiring, *inter alia,* the registration *de novo* of land titles.

exchange of notes between the two governments since Japanese can travel from treaty port to treaty port in China without special passport visas.[14] The scores of retired Chinese civil and military officials who reside in and about Dairen, especially at the Hoshigaura resort, are subject entirely to Japanese jurisdiction there. They are consequently free from pursuit or oppression by Chinese authorities except where the Japanese authorities might choose—and no cases of such have come to the writer's attention—to grant the privilege of extradition. There is no extradition treaty made especially applicable to the leased territory.

In a very real sense, however, a Chinese resident, in the Kwantung leased territory, is a " man without a country ". He is not a Japanese citizen, nor even a Japanese national, within the meaning of the ordinances made applicable to the leased territory. He is subject to Japanese protection as long as he remains in the leased territory, but once having gone beyond its boundaries he is no longer subject to Japanese jurisdiction or protection of any sort. Not being a Japanese national, he is not entitled to a Japanese passport. Such Chinese are not considered *protégés* in the sense in which that term has had application in Siam. Legally, then, the Chinese resi-

[14] The Kwantung Government Ordinance No. 15, 1918, pertaining to aliens, provides (Art. 11) that nationals or subjects of any country, which does not require Japanese subjects entering that country to carry passports or certificates of nationality, shall not be required to carry passports or certificates of nationality in order to enter the leased territory of Kwantung.

dents may claim Chinese nationality even though they were born, and have always lived, within the Kwantung leased territory. No provision has been made to naturalize these Chinese as Japanese subjects. An interesting question arises in the case of Chinese residents who might choose to evade Japanese court procedure by leaving the leased territory and taking refuge on territory over which China has exclusive jurisdiction. In the absence of a specific extradition agreement it appears that a Chinese resident could with impunity escape Japanese jurisdiction, though such property as he might possess in the leased territory might be subject to attachment.[15]

Another interesting matter relates to the subject of military service. It does not appear, that, under the circumstances, the Japanese Government would be within their rights in seeking to muster the Chinese residents of Kwantung into any form of compulsory military service—except such as might by

[15] Certain parallels to this situation were evident in Kiaochow during German occupation. Chinese who resided there were not considered German nationals, although they were subject to German protection and jurisdiction as long as they remained there. Special regulations were promulgated, however, by which Chinese residents might be naturalised as German subjects. In the absence of naturalization in a specific case, however, such Chinese residents were not entitled to German protection when they chose to leave the territory. (Pohl, Otto. *Die Überlassung von Kiaotschou seitens Chinas an das Deutsche Reich,* pp. 23-24; 36-39; Mohr, F. W. *Handbuch für das Schutzgebiet Kiaotschou,* pp. 39-42; 71-78. The latter work is a compilation of decrees and laws for the German lease at Kiaochow, the work having been done by Herr Mohr who had once been an assistant interpreter of the Kiaochow Government. The former was published at Leipzig, 1908; the latter at Tsingtao, 1911.)

international law be sanctioned in time of war. Chinese sovereignty still prevails over the territory though all right to exercise it for the term of the lease has been waived. The military authority of the Japanese over the territory would seem to be restricted to the purposes defined in the convention of 1898, which neither makes Chinese the nationals of the lessee, nor subjects them specifically to any form of compulsory military conscription. The exigencies of war, however, would justify the lessee in proclaiming martial law over the leased territory and enforcing strict obedience from all residents, of whatever nationality, within the territory.[16]

[16] A curious development in connection with this question at Weihaiwei, under British jurisdiction until 1930, occurred when the "Chinese Regiment" was recruited by the British during the early years of occupation. During the Boxer Rising these Chinese troops, under British officers, actually acquitted themselves most efficiently in the campaign to relieve the legations in Peking. "The existence of the regiment was, however, an anomaly. The recruitment of Chinese subjects for the British army would have been of doubtful legality even if it had been confined to Weihaiwei itself, for Weihaiwei is not British territory but only British leased territory; but, as a matter of fact, the recruiting was done for the most part in purely Chinese territory, which made matters worse. . . . . Anomalous though this enterprise may have been in international law, it never gave rise to any protests or caused any friction with the Chinese authorities, provincial or metropolitan." (Ker, W. P. *Chinese under British Rule—Hong Kong, Weihaiwei and Malaya*, p. 41. Unprinted data paper for the Kyoto Conference, Institute of Pacific Relations, 1929.) Sir Reginald Johnston, F. R. G. S., for many years H. M. Commissioner at Weihaiwei, and who was chosen for the unique post of tutor to the Young Empreor, also discusses this "Chinese Regiment" and characterizes it as "anomalous". *Lion and Dragon in Northern China*, p. 460, 1910.)

Allowing for the variations at Weihaiwei from the conventional clauses applicable to Kwantung, it may be noted that the former

These interesting questions as to the exact status of Chinese residents within the Kwantung leased territory should not be interpreted so as to confuse the general principle that Japanese jurisdiction is complete, for all practical purposes, over the province, whether for ordinary administration or for judicial matters.

3. Position in the Japanese Empire. While the Japanese Government has practically complete powers of governing the Kwantung leased territory, it is interesting, and, from the point of view of Japanese constitutional law, important, to note that this territory is regarded under the Japanese Constitution as one wherein a distinctly limited application of that constitution is enforced. Very much as Weihaiwei before 1930 was administered by a High Com-

was considered "practically identical with that of a British Crown Colony though (owing to technical considerations) its official designation is not Colony but Territory". (Johnston, *op. cit.*, p. 80.) Just as in Kwantung, all laws were enacted by the executive alone in the form of ordinances, and just as the fundamental or organic laws for Weihaiwei were promulgated by Orders in Council, so at Kwantung they are promulgated by the Emperor. Sir Reginald Johnston made clear that over the Weihaiwei leased territory "the Emperor of China retains theoretical sovereignty. This is expressly admitted by the British Government, which has declared that Weihaiwei is only a 'leased territory'; its people, though under direct British rule, are not in the strict legal sense 'British subjects'." (*Ibid.*, pp. 85, 428.) As in Kwantung, an attempt was made to enforce Chinese customary law in cases where Chinese were concerned. (p. 435.)

But Weihaiwei is no longer a British leased territory. It was formally retroceded to China on Oct. 1, 1930. (The London *Times*, Aug. 17, 1930; the *North China Herald*, Oct. 7, 1930; The *Peking and Tientsin Times*, Oct. 10, 1930. *Rendition of Weihaiwei:* Treaty Series, No. 50, 1930, London.) There remain in China the leased territories of Kwantung, Kowloon and Kwangchow.

missioner through executive ordinances, acting under the provisions of orders in council which were the organic law for that leased territory, Weihaiwei itself being regarded under the British Government simply as a "leased territory", but having practically the status of a Crown Colony,[17] so the Japanese Government under their Constitution draw a distinction between Kwantung and the main islands of Japan. A similar practice has been widely followed within the British colonies, to a lesser degree within the French colonies, and is characteristic of Chosen and Taiwan, both of which are governed under organic acts promulgated by imperial decrees, and by Japanese law only to the degree to which the latter has been made specifically applicable by imperial ordinance.[18] This practice was adopted by Japan for Kwantung province in accordance with a well-established principle of colonial administration of restricted application of the home constitution in colonies where native customs and laws vary widely from those for which the constitution was originally made applicable.

The question as to the status of Kwantung within the Japanese Empire arose immediately after the acquisition of the leased territory in 1905, but, as in the case of Formosa from 1895 to 1905, there were

[17] Johnston, R. F. *Lion and Dragon in Northern China*, pp. 78, 80, 85, 428.

[18] Takekoshi, Y. *Japanese Rule in Formosa*, pp. 26 ff.; Ireland, Alleyne. *The New Korea*, pp. 142 ff. This constitutional principle in colonial government seems to have been developed partly as a result of the influence of British colonial practice.

rival views in Japan as to the degree to which the Japanese Constitution should be applied to the new territory where the population was, in the great majority, Chinese, whose customary laws were widely at variance with those of the Japanese. In 1908 the status of Kwantung province was very much a matter of controversy in Japan, as the attention given the subject by the Bureau of Laws of the Imperial Cabinet and by the Japanese Diet indicates. After inquiry made by a committee of the House of Representatives on March 25, 1908, Dr. Okano, then chief of the Bureau of Laws, gave his interpretation of the subject as follows:[19]

"Kwantung should be regarded neither as a ceded territory, said he, for it was understood that it should be restored to China at the end of the term originally stipulated between China and Russia, nor as a result of a contract pure and simple, for the province was actually governed under Imperial Ordinances and under occasional agreements with China, which necessarily modified the terms of her original contract with Russia. The territory, therefore, was not properly a part of the Japanese Empire, and the Legislature had no voice concerning it, and yet the Empire exercised, through Imperial Ordinances, the right of government thereof; so that, to employ a phrase of a certain European jurist used in regard to leased territories, the province was, internationally considered, a domestic territory, but, in the eye of the Constitution, a foreign soil."

In this interpretation it appears that Viscount Hayashi, then Minister for Foreign Affairs, con-

[19] Asakawa, K. "Japan in Manchuria." *Yale Review*, Nov. 1908, p. 271.

curred.[20] As a matter of fact, the first organic act for the government of Kwantung province was promulgated as an Imperial Ordinance during July, 1906, under the constitutional principle, applicable alike to Formosa, Chosen and Kwantung, that the Emperor shall determine by promulgation what portions of the general Japanese law shall be made applicable to these colonies or administered areas.[21] Under Japanese constitutional law, supported by the broad ordinance-making power of the Japanese Emperor (Article IX), the principle has been clearly developed that only such laws, passed by the Imperial Diet, as have by specific ordinance been made applicable to given colonies or administered areas, have the force of law in such areas.[22] In view of the actual exercise of political responsibility by the Japanese Cabinet, therefore, the formulation of fundamental laws for these areas has devolved upon that body in behalf of the Emperor. As a result,

[20] *Ibid.*, p. 272.

[21] Imperial Ordinance No. 196. *Official Gazette* [*Kwampo*], August 1, 1906. (*U. S. For. Rels.*, 1906, pp. 1051-9. This reference gives translations of additional ordinances.)

[22] With respect to Formosa, this principle came to be applied as early as 1904, the Government taking the position, in the case involving the removal of Chief Justice Takano Takenori, that "the provisions of the Constitution did not apply to Formosa". (Takekoshi, *op. cit.*, p. 32.) The Japanese Diet, as early as 1896, however, had passed a law providing that only such portions of the law as were promulgated by Imperial Ordinance should have force in Formosa. (*Ibid.*, p. 24.) The same constitutional principle applies to Chosen. (Ireland, *op. cit.*, pp. 143-144.) Similarly, the principle has always been applied with respect to Kwantung. (Mochizuki, K. *Civil Administration in the Kwantung Government*, p. 11.)

the constitutional law of Japan has come to recognize clearly that the Japanese Constitution does not apply with the same rigor in colonies and administered areas as in Japan proper.

While the position accorded Kwantung under the Japanese Constitution has no bearing on the international legal status of the leased territory, the actual form and authority of the Japanese administrative system in Kwantung has no small significance for the Japanese residents there, directly affects the economic development of the area, and indirectly affects the foreign interests, especially foreign shipping companies, who have steamship services to and from Dairen.

Whether Dairen, the chief trade port of Manchuria, is, for the purpose of applying the coastwise shipping laws of Japan, a Japanese coastal port has long been a subject of controversy, and one on which the Japanese ministries for foreign affairs and finance have at time differed. It appears that this question arose in August, 1906, and that the Ministry for Foreign Affairs presented the diplomatic corps at Tokyo with a statement that although the Kwantung leased territory was under Japanese jurisdiction the regulations governing coastwise shipping could not be applied to Dairen. Dairen was declared to be a free port, and, for the purposes of the application of the Japanese coastwise shipping laws, a colonial port.[23]

[23] *Manchuria Daily News*, March 20, 1928; Nov. 18, 1929. *The China Weekly Review*, Nov. 30, 1929, pp. 476-478.

But this view was for a long time challenged by the Ministry of Finance, and apparently by the Ministry of Communications, the former having replied to an inquiry from the British Ambassador at Tokyo in a statement of December, 1911, to the effect that Dairen was considered on the coast line of Japan. Again, as late as 1925, in reply to an inquiry from a British source, the Ministry of Communications stated that a steamer carrying cargo from a Japanese port destined to Dairen in Kwantung province, or to Chosen, Taiwan, Karafuto (Southern Saghalien), and to the Japanese mandated islands in the Pacific, was operating in Japanese coastwise shipping and subject, therefore, to the Japanese coastwise shipping laws.[24] The application of this ruling would, of course, have excluded foreign ships from handling such coastwise cargo, and has, in fact, been a source of continual confusion for foreign shippers.

Even as late as 1928 foreign shippers were kept in doubt as to the application of the early ruling of the Ministry for Foreign Affairs, the Kwantung Government, in particular, refraining from clarifying the matter. The earlier difference of interpretation between the Ministry for Foreign Affairs and the Ministry of Finance, the latter being responsible for giving the instructions to the Japanese customs officials, was again in evidence in March, 1928, when Japanese shipping companies sought to have the Finance Ministry's ruling prevail.

[24] *Ibid.*

A British vessel of the Peninsular and Oriental Steamship Company in March, 1928, carried a cargo from a Japanese port to Dairen thus reopening the issue and calling forth protests of Japanese shipping companies, contesting the right of vessels of foreign registry to operate between Japanese ports and Dairen. The Dairen Shippers' Union urged upon the Kwantung Government in April to exclude foreigners from the trade on the ground that "the sovereignty of the lessee country is in perfect exercise", and Dairen, therefore, should be considered as a coastal port of Japan.[25] That this protest was entirely misinformed when it sought to justify the policy by attempting to claim that, because the territory was under Japanese jurisdiction, it was also subject to an unrestricted application of the Japanese Constitution, and of Japanese coastwise shipping laws in particular, is, of course, obvious. Whether those shipping laws apply to Kwantung province is purely a matter of policy to be decided by the competent Japanese authorities, and, as it seems quite impossible to divorce the issue from political questions, it would seem that the ruling of the Ministry for Foreign Affairs should prevail.

This confusing controversy has not been finally settled even though a new test case arose when the "*City of Derby*", a vessel of British registry belonging to the Ellerman line, took aboard at Yokohama on the sixteenth of November, 1929, a cargo of

[25] *Manchuria Daily News*, March 20, 1928.

six motor cars billed to Dairen in Kwantung province. The superintendent of customs at Dairen permitted the landing of the cargo. A protest was immediately made by local Japanese steamship companies which sought to forfend foreign competition. The Ministry for Foreign Affairs, evidently considering it a political question, in accordance with its original ruling of 1906 instructed the Finance Ministry, which in turn instructed the Japanese customs officials, that the landing of the cargo was not a violation of the Japanese coastwise shipping laws because Dairen was not considered a coastwise port of Japan.[26]

In spite of the fact that other somewhat similar cases have arisen recently, involving the issue as to whether or not Dairen is to be regarded as a coastwise port of Japan, there does not seem to be an entirely definitive ruling on the subject by the Ministry of Foreign Affairs, concurred in by the other departments of government, and communicated in decisive terms to foreign governments concerned.[27]

[26] *Manchuria Daily News*, Nov. 18, 1929. Cf. *The China Weekly Review*, Nov. 30, 1929, p. 477.

[27] The Japanese Foreign Office seems to have taken the position in 1931 that traffic, both passenger and freight, between Japan proper and Dairen, is open to all foreign ships; or, in other words, that this is not coastwise traffic.

CHAPTER V

Extraterritoriality and the Kwantung Lease

The fact that foreigners residing in the Kwantung leased territory are not entitled to trial, either by their own consular officers or in special courts, such as the United States Court for China, in cases arising within the leased territory, throws considerable light on the scope and character of jurisdictional authority conceded in practice to the Japanese Government in this territory. Although historically, and especially outside of official circles, there has been some confusion as to whether extraterritorial rights under the China treaties were also applicable to this and to other leased territories in China, it is quite evident that since 1905, at least, the uniform practice of the states having such form of qualified immunity from Chinese jurisdiction has been that these treaties do not apply to Kwantung.[1] Any foreigner committing a crime or being the defendant in a civil process in Kwantung province is subject to trial in the local Japanese courts.

[1] Dr. W. W. Willoughby and Professor G. W. Keeton have questioned the decision of Judge Milton D. Purdy in the case of *U. S. v. A. W. Smith*, U. S. Court for China, Shanghai, 1925, in which he held that the United States Government had no jurisdiction to try in this court cases involving American citizens arising in the Kwantung leased territory. (Cf. Willoughby, W. W., *Foreign Rights and Interests in China*, Vol. I, p. 482, rev. ed.; Keeton, G. W. *The Development of Extraterritoriality in China*, Vol. I, pp. 307-308.)

In view of the attitude of the Russian Government with respect to this leased territory, explicitly communicated to the foreign powers during 1903, it is somewhat surprising that so much confusion should early have arisen over this matter. As late as 1910 an American student of Manchurian affairs, usually a close observer of the realities, but also occasionally inclined to hasty generalizations, wrote that during his stay in Dairen he had had the assurance of one of the foreign consuls that "it had not yet been made clear how far the scope of Japanese jurisdiction extended, and whether or not, it included authority to arrest and try foreigners for criminal offences".[2] As a matter of fact, no civil suit involving exclusively foreigners seems to have come before the Japanese local courts in the territory until 1911.[3] The uncertainty of the consuls, however, as to their jurisdiction in the leased territory may be somewhat understandable when it is realized that as late as 1925 an attempt of the counsel for an American plaintiff to bring suit in the United States Court for China in Shanghai was made on the ground that Dairen was not excluded from China for the purpose of applying American consular jurisdiction under the China treaties.[4] Even in 1926 and 1927 the writer

[2] Harrison, E. J. *Peace or War East of Baikal?* p. 274.

[3] *Emmern v. Sietas and Co.* Brought by plaintiff, Mr. Emmern, a Russian resident of Harbin, against the company, which had its headquarters in Tsingtao in the German lease. It involved the question of transfer of title to the Kwantung Brewery at Port Arthur. (*Manchuria Daily News*, Sept. 14, 1911.)

[4] *U. S. v. A. W. Smith*, 1925. U. S. Court for China, Cause No. 2331; Criminal No. 947.

was informed in Dairen that certain American business firms there had to be instructed by the American consul that they were obligated to pay whatever taxes were levied upon them by the local Japanese authorities.

But whatever the confusion among the foreign consuls at Dairen—who might, however, have been expected to be informed of the attitude of the American Government, expressed very clearly as early as 1900, and concurred in by all foreign powers at that time except Japan—it is quite evident that the official attitude of all states having extraterritorial privileges in China and consular representation at Dairen has been entirely uniform and consistent ever since 1905. In 1900 the Department of State of the United States clearly committed the American Government to the position, then expressed by Secretary Hay in his instructions to Minister Conger at Peking, dated February 3, to the effect that the United States did not claim for their nationals in any of the leased territories in China such privileges as were accorded them in the extraterritorial clauses of the China treaties.[5]

This early interpretation by the Solicitor of the United States Department of State, since it has been the basis for the consistent policy of the American Government in this matter of jurisdiction over Amer-

[5] *U. S. For. Rels.*, 1900, p. 387. Cited by Willoughby, *op. cit.*, Vol. I, p. 480. This statement of official policy and interpretation had been prepared by Mr. Van Dyne, Assistant Solicitor of the Department (Cf. Moore's *Digest*, Vol. II, p. 640.)

ican nationals in the Kwantung leased territory ever since, deserves quotation:[6]

"As it is expressly stipulated in the lease that China retains sovereignty over the territory leased, it could doubtless be asserted that such territory is still Chinese territory and that the provisions of our treaties with China granting consular jurisdiction are still applicable therein. But in view of the express relinquishment of jurisdiction by China, I infer that the reservation of sovereignty is merely intended to cut off possible future claim of the lessee that the sovereignty of the territory is permanently vested in them. The intention and effect of these leases appear to me to have been the relinquishment by China, during the term of the lease, and the conferring upon the foreign power in each case of all jurisdiction over the territory. Such relinquishment would seem, also, to involve the loss by the United States of its right to exercise consular jurisdiction in the territories leased".

The grounds in law for this interpretation are, therefore, clearly stated in the department's memorandum: "in view of the express relinquishment of jurisdiction by China", within the leased territory, and the conferring of that authority upon the lessee, foreign consular authorities cannot be permitted to exercise jurisdiction under exequaturs received from the Chinese Government. The practice in Kwantung has always been that foreign consuls

[6] *U. S. For. Rels.*, 1900, p. 387. "The Powers from the first took the position that the leases of Chinese territory transferred complete jurisdiction to the lessee and that third states could not exercise extraterritorial jurisdiction within them, thus apparently the lessee was alone responsible toward other states for incidents in the territories during the life of the lease." (Wright, *Mandates under the League of Nations*, p. 300.)

there must receive their exequaturs from the lessee, Russia until 1905, Japan thereafter.[7] In a covering letter of Secretary John Hay, transmitting the above memorandum to Minister Conger at Peking, the following additional statement of official policy was expressed:[8]

"The intention and effect of China's foreign leases having apparently been the relinquishment by China during the term of the leases and the conferment upon the foreign power of all jurisdiction over the territory, such relinquishment and transfer of jurisdiction would seem also to involve the loss by the United States of its right to exercise extraterritorial consular jurisdiction in the territories so leased, while, as you remark, as these territories have practically passed into the control of peoples whose jurisprudence and method are akin to our own, there would seem to be no substantial reason for claiming the continuance of such jurisdiction during the foreign occupancy or tenure of the leased territory."

Immediately upon the receipt of this statement of interpretation the American Minister at Peking directed all American consuls within such leased territories to exercise no consular authority therein under the treaties granting extraterritorial jurisdiction to Americans in China, and cautioned them against performing even ordinary non-judicial consular acts, which, under Chinese exequaturs, they would be permitted to exercise outside such territories.[9]

[7] The United States Government had no consular representation at Dalny (Dairen) until after the Russo-Japanese war, the nearest consul being at Newchwang, more properly, Yingkow.

[8] *U. S. For. Rels.*, 1900, pp. 387 ff.

[9] *Ibid.*, p. 389.

When, therefore, the Russian Government announced that foreign consuls would be admitted to Dalny, now Dairen, they officially communicated to foreign governments that such consuls would have no rights beyond those accorded them throughout Russian territory.[10] The official Russian view was

[10] *Ibid.*, 1903, pp. 84-85. On Jan. 17/30, 1903, the Russian Foreign Office sent to Mr. Robert S. McCormick, American Ambassador at St. Petersburg, an official statement as to their jurisdiction in the Kwantung leased territory, including instructions that foreign consuls were to apply for their exequaturs to the Russian Government.

"The Imperial Government has decided to admit the presence of consular representatives of the powers in the aforesaid city [Dalny] on the following terms:

"The exequatur required for the assumption of functions by the representatives in question must be asked for, in the ordinary way, through the foreign office in St. Petersburg. The jurisdiction of these representatives extends throughout the whole territory of Kwangtung [Kwantung], to the exclusion of Port Arthur and other fortified points, which will be designated by the local military authorities.

"Considering that Russian legislation is enforced throughout the said territory and that Russian tribunals are established there, foreign consuls at Dalny will have no rights and prerogatives beyond those which are accorded to them throughout the Russian Empire. In the interests of good administration of affairs, these consuls will deal directly with the administrative authorities of the territory in all questions falling within their province.

"No consular representatives of other powers, excepting the one established at Dalny, shall be entitled to intervene in the affairs of his nationals in the territory referred to." (*U. S. For. Rels.*, 1903, p. 708.) This communication was sent to the U. S. State Department under date of March 20, 1903.

In the same year a case arose involving an American subject wishing to sue a Russian for damages sustained in connection with a real property lease near Newchwang (Yingkow). The Russian consul there informed American Consul H. B. Miller that the case would have to be tried at Port Arthur. Mr. Miller referred the case to Minister Conger, March 17, 1903, and questioned the right of the Russians to compel the trial of the case in the Kwantung leased

tacitly approved by the United States with respect to a case then pending, which was adjusted on the basis of the interpretation contained in the Russian official memorandum communicated to Ambassador McCormick at St. Petersburg during January, 1903. All powers accepted the Russian interpretation as stated, with the exception of Japan who declined to admit the Russian claim.[11] The Japanese Govern-

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territory since this was "under the control of Russian authorities governed by Russian law". Minister Conger, replying, stated that, in his opinion, the Russians could require the American to sue in Port Arthur if he wished to bring proceedings against a Russian subject, declaring that "in the absence of any treaty or other agreement between the United States and Russia on the subject, if any American wishes to invoke the aid of a Russian court he will have to go wherever Russia has established such courts". Mr. Conger referred the matter to the State Department, but it does not appear that the Department altered this official view. Three days later Mr. Conger received and despatched to the American consul at Newchwang a copy of the Russian Foreign Office declaration as to their jurisdiction in Kwantung. (*U. S. For. Rels.*, 1903, pp. 50-51.)

[11] *Ibid.*, pp. 387-388. In 1899 Mr. A. A. Adee requested Minister Conger to advise the Department of State as to the attitude of the powers toward this matter of consular jurisdiction in the leased territories. Mr. Conger replied, Dec. 11, 1899, that "all of them, except the Japanese, agree that the control over all of these leased ports, has during the existence of the lease, passed as absolutely away from the Chinese Government as if the territory had been sold outright, and that they are as thoroughly under the jurisdiction of the lessee governments, as any portion of their home territory and thus consuls, accredited to China, would not attempt to exercise jurisdiction in any of the said ports. . . . . The Japanese claim that sovereignty is too important a matter to pass thus with a lease, and say that China can, if she wishes, surrender jurisdiction over her own people, but they do not agree that these lessee governments shall or can exercise jurisdiction over other foreigners in the leased territory. However, no case has yet arisen for them to test the matter." (*U. S. For. Rels.*, 1900, pp. 383 ff.)

ment reversed their official attitude after they obtained possession of the Kwantung lease in 1905.

Whatever may have been the confusion over this question of consular jurisdiction in the leased territories in general, and in Kwantung province in particular, before 1925—and sufficient details have been presented above to substantiate the assertion made at the outset that *officially* there has been entire uniformity and consistency in the policy, particularly of the American Government, ever since 1900—the matter seems to have been settled definitely, as far as the United States is concerned, with respect to Kwantung, in the leading case on the subject which came before the United States Court for Shanghai in 1925. No subsequent cases have arisen, and the precedent there established, that in cases arising between American nationals in the Kwantung leased territory they are subject exclusively to Japanese jurisdiction, will presumably be followed in future.[12]

[12] *U. S. v. A. W. Smith,* 1925. U. S. Court for China; Cause No. 2331; Criminal No. 947.

Case of U. S. v. A. W. Smith

This case came before the U. S. Court for China at Shanghai on March 2, 1925, on a motion of counsel for the defendant, Arthur W. Smith, an American citizen, to quash an information filed in the court on Oct. 16, 1923, on the ground that the accused, Mr. Smith, charged with having committed an assault with a dangerous weapon upon one, Paul C. Naile, at Dairen, Manchuria, Republic of China, was not subject to jurisdiction of the court because the alleged crime was committed in Dairen, "a place within the jurisdiction of the Empire of Japan, and not of China". The district attorney, in opposing the motion, conceded that Japan had succeeded to the Russian lease in 1905, and that "the Chinese courts ceased to function in

In this case of *U. S. v. A. W. Smith,* which arose out of assault and battery committed upon three American members of the crew of the merchant vessel "Patrick Henry" in October, 1923, by the master of the vessel, and which came before Judge Milton D. Purdy of the United States Court for China at Shanghai, in April, 1925, the court had to face squarely the question of whether or not, in cases

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such leased territory" during the Russian occupation. He contended, however, that "notwithstanding such apparent relinquishment of jurisdiction on the part of China, the United States never lost its extraterritorial jurisdiction over crimes committed by American citizens in such leased territory, and that the United States now has the right to try and punish American nationals for crimes and offenses which they may commit within such territory".

The court stated the case as follows: "The defendant, a captain of an American ship, while in a dancehall in the city of Dairen, on the 6th day of October, 1923, is alleged to have committed an assault, with a dangerous weapon upon the person of one, Paul C. Naile. It does not appear that Smith was arrested for this offense while in Dairen, either by the Japanese, or by the American authorities, but when his ship arrived in Shanghai, on or about the 16th day of October, 1923, an information was filed before the United States Commissioner for China for preliminary examination. Upon such preliminary examination, defendant's counsel objected to further proceedings in the matter, upon the ground that the court was without jurisdiction to bind the defendant over for trial before the United States Court, for the reason that Dairen was situated within that portion of the Liaotung Peninsula known as the leased territory, and was under the exclusive jurisdiction of the Empire of Japan. The United States Commissioner rendered an opinion in writing, in which he rejected such contention, and held that the United States Court for China had full jurisdiction to try the defendant for the offense charged, and inasmuch as there was sufficient evidence to make out a *prima facie* case against the defendant, he ordered that the defendant be held for trial before the United States Court for China. I am now called upon, in determining this motion, to review the conclusions reached by the Commissioner in that decision, and

arising between two Americans in the Kwantung leased territory, jurisdiction was with the court or with the Japanese authorities. The Japanese authorities had refrained from assuming jurisdiction in this case merely out of comity for the United States Government, although without a specific waiver of juristic right in the matter. United States Court Commissioner, Mr. Lurton, in the interval before actual

to decide '*de novo*' whether this defendant should now be discharged or whether he must stand trial under the information which has been filed against him." (All quotations in footnote above are from an official copy of the opinion in this case rendered by Judge Milton D. Purdy, April 28, 1925, as communicated personally to the writer under covering letter from Judge Purdy, dated July 26, 1926, addressed to Peking.)

A more intimate version of the circumstances which gave rise to this case would include the following details, obtained by the writer from official sources in Dairen. On Saturday night, October 6, the members of the crew of the U. S. S. B. *Patrick Henry* were carousing in the Taizen Restaurant in Dairen, when A. W. Smith, the skipper of the vessel, entered, and, after preliminary exchanges of words, proceeded to batter three members of his crew with a Benedictine bottle, each sustaining serious head wounds. The Japanese police entered the restaurant, stopped the brawl, and took temporary custody of the disturbers of the peace. Consul Eli Taylor on October 7, requested of Mr. Moriwaki, of the Japanese police station, that the men be released on condition that the consul take the responsibility for seeing that justice was done in the case. The request was granted as a matter of comity. Paul C. Naile, in behalf of the three, brought suit subsequently in Shanghai.

It is clear that the Japanese had the right to make the arrest of these men, even though they were foreigners, and that the Japanese authorities in this case, as in numerous such cases, usually turn the accused over to the American consulate for attention, though they are not required by international law to do so. The local authorities here are indisposed to take action in cases where crews of foreign ships are involved, but in this instance the injury to one of the men was so serious that they felt compelled to do so.

consideration of the case in the Shanghai court, had filed an opinion in which he held that Captain Smith was amenable to prosecution on the ground that the United States had never lost its extraterritorial privileges in the Kwantung leased territory.[13] Judge Purdy reversed this opinion as being contrary to fact and law.

Judge Purdy, after quoting the provisions of the American treaty of 1844 (Wanghsia), providing for extraterritorial jurisdiction by American consular officers, stated that the application of such provisions to territories over which China subsequently relinquished jurisdiction could not be contended, since, in cases where such relinquishment clearly conceded jurisdictional authority to a foreign state, it would be patently contrary to the purpose of the original extraterritorial clauses to attempt to enforce them outside Chinese jurisdiction. Among such territories over which China had relinquished jurisdiction were the leased territories, including Kiaochow, Weihaiwei and Liaotung. He then quoted the clause of the

[13] After reversing Commissioner Lurton's opinion, Judge Purdy, upon inquiry from the writer, wrote him as follows: "When the case came before me for trial the same objection was raised by defendant's counsel, and I took a different view of the law from that expressed by Commissioner Lurton. . . . . The question appears to me so plain as to admit of very little argument, and I am inclined to think that after you and . . . . have given the matter the consideration which I have given it, that you will agree that I am right in the conclusion which I have reached in my opinion and decision." (Private letter to the author, dated Shanghai, July 26, 1926.)

original lease convention of 1898 by which Russia was given "the entire military command of the land and naval forces and equally the supreme civil administration" of Kwantung, noting that the sovereign rights of China were, however, specifically reserved to the lessor. "This language has furnished ground for the argument that Chinese sovereignty over this leased territory was never intended by the contracting parties to be surrendered by China to Russia, and for that reason, foreign powers, such as the United States, did not lose extraterritorial rights over their nationals within such leased territory. But it seems that such a construction of this provision of the treaty was not only disavowed by Russia shortly after the treaty was negotiated, but that Russia's interpretation of this provision was acquiesced in by practically all the nations which at that time enjoyed extraterritorial rights in China."[14] The court then quoted the Hay instructions to American consuls, and the memorandum of Assistant Solicitor Van Dyne on the point, dated February 3, 1900.[15] It was evident, therefore, that the United States Government had conceded to the Russians their right, under the regulations governing the appointment of foreign consuls to the Kwantung leased territory of 1903, to exercise sole judicial authority.

[14] A more accurate statement of the situation would seem to have been that, although China retained sovereignty over the leased territory, all jurisdictional rights for the term of the lease were conferred on the lessee.

[15] *U. S. For. Rels.*, 1900, p. 387; 1903, pp. 84-85.

Judge Purdy then described the manner of acquisition of these same rights by Japan in 1905, stating that although the original lease was to expire in 1923, the Japanese Government, in 1915, " made certain demands upon China, which China seems to have acquiesced in with considerable reluctance, and during the negotiations, our State Department advised China that the American Government would insist upon the reservation and protection of certain American rights in Manchuria ". He continued: " I do not find, however, that America's protest to China, at that time, involved in any manner a re-assertion of extraterritorial rights on the part of the United States in the territory covered by this lease, which rights had been lost by the United States in 1898, as pointed out by Assistant Solicitor Van Dyne in his memorandum, when China relinquished jurisdiction to Russia over this territory for a period of twenty-five years." He, therefore, expressed the judgment of the court as follows:

" In view of this attitude of our Department of State, which has been uniformly observed for more than a quarter of a century, and in view of a similar attitude having been observed, with respect to this same matter during the same period, by all of the other nations having extraterritorial treaties with China, I find no difficulty in reaching the conclusion that this court is without jurisdiction to try this defendant for the crime charged in the information, and that the motion to quash, should be granted.

" As I view it, the question involved is political rather than judicial, and as the political, or administrative, branch of our Government has declared, in unequivocal terms, that our

nationals have no longer extraterritorial rights within this leased territory, it seems to me that it is incumbent upon the courts to recognize and give effect to such declaration. Any other course might be fraught with international complications and consequences of a very serious character."

This, then, was a "political question" in the eyes of the court, one in which the court was bound by the official attitude of the executive department. The diplomatic significance of this case, while it was pending decision in Shanghai, was such that it was imperative to have the view of the State Department clearly re-stated, and there is evidence that the American consul-general in Shanghai, Mr. Edwin S. Cunningham, had obtained such a statement from the department during October of 1923, and had himself expressed the opinion that, in view of the general recognition that Japan had jurisdiction in Dairen it was quite impossible to concede the view of the court commissioner and of the United States district attorney in claiming jurisdiction for the court in Shanghai. Obviously, the opinion of the commissioner and of the district attorney was entirely irreconcilable with the facts which had been admitted in practice at Dairen since 1900. While the opinion of Judge Purdy was naturally guided by the fact that this was a political question in the eyes of the court, the decision itself is nevertheless, reasonable, based as it was on strictly juristic grounds.

These juristic grounds are quite clear, and entirely in accord with the *de facto* situation in the Kwantung leased territory for a quarter century. With

the transfer of the Kwantung or Liaotung territory to Russia under the lease convention of 1898 the instrument of transfer clearly contained articles conferring practically complete jurisdiction upon the lessee state, Russia. Consequently, where Chinese jurisdiction no longer existed, for the term of the lease, extraterritorial jurisdiction no longer existed either, for there could not be this exception to something which did not itself exist. Extraterritoriality for foreigners in Japan had long since been abolished, and foreigners, therefore, were naturally as subject to Japanese trial in Dairen, when the Japanese acquired the lease in 1905, as if they resided in Tokyo or Kobe.

The conclusion is obvious that, in so far as leased territories in China are concerned, the question of powers of consular officers is not to be determined by inquiring who possesses sovereignty over them, but rather who possesses jurisdiction. Although China remains sovereign over the Kwantung leased territory, which is to say that China has a right to recover the territory eventually, foreign consuls, nevertheless, receive their exequaturs from the lessee state.

Professor W. W. Willoughby, after referring to the conflicting opinions of Commissioner Lurton and Judge Purdy in the case of *United States v. A. W. Smith,* concludes, without stating his reasons therefor, that "from a juristic point of view" that of

Judge Purdy in this case "is not fully convincing".[16] This criticism would seem, however, to have been made on the assumption that the possession of sovereignty over the territory by China should be the determining factor in deciding whether the extraterritoriality treaties of foreign states with China apply therein, or possibly on the assumption that the actual exercise of jurisdiction by the lessor state is greater than, under the provisions of the original lease convention, it really is. Dr. Willoughby also cites the Lurton opinion to the effect that "China had given to the United States extraterritorial rights and could not diminish them by an agreement made with another party [Japan], to which the United States was not a party".[17]

With regard to this latter position it may be said, however, that, in strict logic from this premise, it would have to be held that China could not enter into a treaty with a single foreign state transferring title in perpetuity and full sovereignty to that state, simply because by so doing the rights of third parties to extraterritorial privileges within such territory would be abrogated. This position would, of course, be entirely untenable since, as a legal proposition, China, as any other state, possesses the right to dispose of her own territory as she sees fit, except where

[16] Willoughby, W. W. *Foreign Rights and Interests in China.* Vol. I, p. 482.

[17] *Ibidem.*

there may be specific conventions with foreign states with regard to non-alienation.[18]

The extraterritorial treaties with China have never been interpreted as constituting any limitation upon China's sovereign right to dispose of any portion of her territory as she sees fit, and the United States Government has never taken the position that, by the creation of these leased territories, within which it has been generally accepted that extraterritorial rights are not applicable, any American rights under treaties with China have been impaired.

The opinion of Commissioner Lurton was given on the assumption that the sovereignty retained by China over the Kwantung lease also carried with it jurisdictional rights, and that in 1915, when Japan obtained the extension of the lease to ninety-nine years in a treaty and exchange of notes with China, China did not concede complete jurisdiction to Japan. A glance at this treaty and exchange of notes will indicate that, with respect to the matter of the leased territory, the subject of jurisdiction is not even raised. These agreements were entered into on the assumption that the *status quo* with respect to jurisdiction should continue, after 1915, for a prolonged period. While this opinion of the United States Court Commissioner at Shanghai previous to the de-

[18] " . . . . The State may go to any extent in the delegation of the exercise of its powers to other public bodies, or even to other States; so that, in fact, it may retain under its direction only the most meagre complement of activities, and yet not impair its Sovereignty." (Willoughby, W. W. *An Examination of the Nature of the State.* p. 196.)

cision of the court itself in 1925 did not have the force of a judicial determination, it has since been shorn of any importance by the adjudication of the specific case in the United States Court for China before Judge Purdy. In that opinion, the court took the view that, while the American Government had in 1915 reserved certain rights under these agreements, the protests of the government did not involve "in any manner a re-assertion of extraterritorial rights on the part of the United States in the territory covered by this lease, which rights had been lost by the United States in 1898".[19]

As to the contention that rights under extraterritoriality are derivable in leased territories rather from the state which legally possesses sovereignty than from the state which has general control of administration and jurisdiction within the territory, it may be said that, in the case of the Kwantung lease in particular, this assertion is contrary to the uniform practice of all the powers since 1905, and that *in strict law* it is more reasonable to hold the contrary. An analysis of the true meaning of the reservation of sovereignty to China in the case of the Kwantung lease reveals that that reservation can mean nothing beyond a declaration of the ultimate right to recover the territory at the expiration of the lease. Until

[19] Mr. Paul Heaton, in an article on "The Jurisdiction of American Courts in China", characterizes the Lurton opinion as "an interesting, if somewhat doubtful" exception taken to the official position of the United States Government. (*Chinese Social and Political Science Review*, Jan., 1928, p. 42.)

then, " entire military command of the land and naval forces and equally the supreme civil administration " of the territory is conferred upon the lessee. China has reserved no rights with respect to the conduct of foreign relations of this territory, except such as are involved in the single question of recovery of the territory itself. Customs control is specifically conceded to the lessee for the territory. In practice, the lessee has been given complete authority to determine the question of entry of nationals of third states within the territory. In war, the leased territory has been regarded as as much the territory of the lessee as any integral portion of its domain. Under these circumstances it is apparent that complete jurisdiction, whether for internal or external purposes, is within the province of the lessee state.

These factors, which give evidence that it would be patently impossible for the state which possessed sovereignty, but without any right to exercise it for the period of the lease, to accept responsibility for that territory's relations with third states, constitute a realistic criticism of the proposal of Sir Thomas Barclay, an eminent English publicist, that the lessor state should remain responsible for all circumstances which arise on a leased territory *vis-à-vis* third states and their nationals.[20] His proposal

[20] " L'Etat bailleur restera responsable de tous faits qui se produiront sur le territoire loué, vis-à-vis des tierces puissances et de leurs ressortissants." This was the proposal of Sir Thomas Barclay at the session of the Institute of International Law held at Florence

would be entirely unworkable if an effort were made to apply it to the Kwantung leased territory, and obviously takes no account of the fact that, in this case, the possession of sovereignty carries with it no rights to exercise any form of administration within it. The proposal of Sir Thomas Barclay was evidently made on the assumption that the lessor state, because nominally sovereign, could in practice effectively deal with third states with respect to matters of foreign relations, an assumption which, in the case of the Kwantung lease, is invalid.[21]

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in 1908. (Yang, Léon, *Les Territoires à bail en Chine,* p. 103.) In criticism of this proposal it may be said that the practice of the European powers, in situations which may be taken as for this purpose analogous, is entirely contrary to the proposal of Sir Thomas. When Austria-Hungary, after 1879, entered into conventional agreements with foreign states on the assumption of possession of the right to establish courts of law for the residents of Bosnia and Herzegovina, which were territories occupied and administered by the dual monarchy, foreign states withdrew their claims to extraterritorial jurisdiction within these provinces which otherwise they would have had under the Turkish capitulations. (Westlake, J. *International Law,* Vol. I, pp. 135 ff.) Bluntschli particularly contended that this was the only realistic view which could be taken. Nor is it necessary to claim that leased territories are "disguised cessions" to hold this view.

[21] The realities of the situation are better expressed by Professor Quincy Wright as follows: "The Powers from the first took the position that the leases of Chinese territory transferred complete jurisdiction to the lessee and that third states could not exercise jurisdiction within them, thus apparently the lessee was alone responsible toward other states for incidents in the territories during the life of the lease." (Wright, Quincy. *Mandates under the League of Nations,* pp. 80-81.) (Cf. U. S., *Naval War College: International Law Situations,* 1902, pp. 28-35.)

The actual practice in leased territories in China including Kwantung is by no means one which finds no justification in well-recognized principles of international law. It is based, first, on the principle that sovereignty can be and is frequently divorced from the actual exercise of jurisdiction within a given territory.[22] In the second place, it is based on the necessity of holding that state which actually is in possession of governmental authority over the territory responsible for injuries to nationals of third states.[23] To hold the state possessing sovereignty over the leased territory responsible to third parties would be to create a manifest injustice to that state, for the lessor, having no police authority, within the area, could not assume the obligations expected of it.

This view appears the more reasonable in law the moment one proceeds to vision a situation which would result from requiring foreign consuls to obtain their exequaturs from the Chinese Government in order to exercise their authority at Dairen. Such a situation would be patently anomalous and un-

[22] "International lawyers should experience no difficulty in distinguishing between legal sovereignty and the actual exercise of rights of jurisdiction." (Lauterpacht, *op. cit.*, p. 189.) (Cf. Wright, *op. cit.*, pp. 372-373.)

[23] "States may hold a particular authority responsible for injuries in a given territory without intending to recognize the latter as sovereign of the territory, but merely of the administration. The lessee, for instance, is held responsible for international delinquencies in leased territory, and the protector is usually held responsible for such incidents in a protectorate. Thus the practice in regard to responsibility is not conclusive evidence of recognition of sovereignty." (Wright, *op cit.*, p. 507.)

workable.[24] The matter of consular residence and jurisdiction in the Kwantung leased territory is, therefore, declaratory of the fact that under the agreements with respect to the lessee's jurisdictional authority in the territory, and in accordance with the established practice, Japan's jurisdictional rights there are practically unlimited. A change in the powers of foreign consular officials in China would have no effect on the status of consuls at Dairen, for in the leased territory they must receive their exequaturs from the Japanese, not the Chinese, Government.[25]

[24] I find, therefore, no difficulty in agreeing with the conclusion of Dr. Hsia Ching-lin that "during the period of the lease, the other power's extraterritorial jurisdiction stands or falls together with the territorial sovereign's or lessor's jurisdiction". I cannot, therefore, agree with his contradictory statement that nationality should be the "determining element in the matter of jurisdiction". (Hsia, Ching-lin. *Studies in Chinese Diplomatic History*, pp. 109-110.) China clearly waived jurisdiction over the Kwantung leased territory in 1898, withdrew her governmental agents, even from Chinchow in 1903, and, as Russian and Japanese courts have superseded the Chinese courts, the jurisdiction of foreign consuls, both legally and practically, had to be determined exactly as the universal practice of states having consuls there has established. Referring to the leased territories in China in 1904, Professor Lawrence tersely summarized this situation when he wrote: ". . . . Foreign consuls in those places could no longer exercise the special powers granted to them by treaty with China. The territories in question were held to be under the full and exclusive jurisdiction of the states to which they were leased, whose authority was deemed supreme while the leases remained in operation." (*War and Neutrality in the Far East*, p. 272.)

[25] Although it is not strictly adequate to apply to the Kwantung leased territory international practices, presumably applicable by analogy, of other somewhat similar international situations elsewhere, it is evident that the practice with regard to consular jurisdiction in

several of such areas only lends support to the conclusion above. After 1905, when the Japanese Government reversed their interpretation of this subject, the conclusion detailed above has had the support of practice in all the leased territories in China.

Dr. Hsia admits that Phillimore's attempt to hold that foreign powers still retained their rights under the Turkish capitulations over the island of Cyprus, even after the right to "occupy and administer" the island had been conceded to the British Government in 1878, was not affirmed by the practice of states thereafter. (Hsia, *op. cit.*, p. 109.) In the case of Cyprus, even though the Porte retained considerably greater authority than did China in the Liaotung leased territory, nevertheless, the other powers "acquiesced in the supersession of the consular jurisdiction by the British courts". (Westlake, J. *International Law*, Vol. I, p. 138.)

The case of Bosnia and Herzegovina after 1879 was somewhat similar. The treaty of Berlin provided that these provinces "shall be occupied and administered by Austria-Hungary", the nominal sovereignty to remain with Turkey. Foreign states then took the position that they no longer had consular jurisdiction within these provinces of the character permitted them under the capitulations with the Ottoman Empire. Neither Westlake nor Oppenheim contested the view that consular jurisdiction under the Turkish capitulations was forthwith abrogated within these territories. (Westlake, *op. cit.*, p. 136; Oppenheim, Vol. I, p. 233.)

A Chinese scholar in a recent French dissertation has admitted the practical validity of the American interpretation of extraterritoriality as applied to leased territories in China, although he holds that, on strictly juristic grounds, the view is contestable. It may be answered that on strictly juristic grounds it is equally possible to contend that consular jurisdiction should be determined not by inquiring who has nominal sovereignty, but by inquiring who has the power to exercise jurisdiction over the territory in question. Here is a case where international law needs to adjust itself to particular cases which do not fall conveniently into general categories. This Chinese scholar, Dr. Léon Yang, however, admits that the practical view is tenable, and concludes: "Comme nos amis américains sont des gens pratiques, ils ont adopte la premièr". So also have all other foreign states. (*Cf.* Yang, Léon, *Les Territoires à bail en Chine*, p. 128.)

CHAPTER VI

The Status of Kwantung in International Law

1. The Absence of Analogous Situations in China and Elsewhere. There is, to repeat, a great technical danger that, in treatment of leased territories, the subject of the reserved sovereignty of the lessor state be confused with the grant by the lessor to the lessee of the right to exercise practically exclusive political or jurisdictional authority within such territories. No good purpose can be served by such a treatment, for these political leases illustrate a situation, unusual, to be sure, in international situations, where the mere fact of possession of sovereignty by one state is no adequate measure at all of power to exercise jurisdiction within such territories. The reservation of sovereignty, therefore, generally speaking, is important principally because it is a means of distinguishing such political leases from territory ceded in full sovereignty and perpetuity, and because it is declaratory of the right of the lessor state to recover such territory at the conclusion of the term of the lease.

There is also a great danger in the study of political leases, each of which derives its character largely from the terms of the instrument of lease itself, that reasoning from presumed analogous situations will lead to conclusions entirely untenable

and irreconcilable with the terms of the instruments of transfer. In seeking to analyze the international legal status of, and the exercise of jurisdictional rights, therefore, in such a political lease as Kwantung, it is imperative that reliance be placed principally upon the terms of the lease convention, and to utilize somewhat analogous situations only to illustrate interpretation of mooted points where international law itself is lacking in decisiveness. The fact is that there exist today but few illustrations of leased territories which preserve the legal anomaly of division of sovereignty and actual jurisdictional rights between two states, and no situation exactly comparable to that which exists with respect to the Kwantung leased territory.

As for the political leases granted to various powers in China during 1898 it is quite evident that the instruments of transfer vary considerably in their textual provisions, some of which are evidence of fundamentally different concepts as to political leases. The German lease at Kiaochow bay in Shantung province was, for example, a close parallel to that at Kwantung in some respects—but the lease itself has now been recovered by China. Weihaiwei has also been retroceded to China, the formal act of restitution having occurred on October 2, 1930.[1] Consequently, of the original leaseholds obtained from China in 1898 only Kwantung, Kowloon and Kwangchow remain. The British and Japanese dele-

[1] The *North China Herald*, Oct. 7, 1930.

gations at the Washington Conference made it quite clear that they had no intention to restore to China in the near future their leases at Kowloon and Kwantung respectively, while the French delegation made only indecisive references to the future of Kwangchow.[2] Neither Kowloon nor Kwangchow furnishes a close parallel to the situation of Kwantung in Manchuria.[3]

[2] *Conference Proceedings*, pp. 1064 ff.; pp. 1556 ff.

[3] Certain differences evident in the leased territories in China may readily be pointed out to illustrate the point. The original Weihaiwei convention of 1898 contained no specific reservation of sovereignty by China, Great Britain having been granted within the narrow strip paralleling the shoreline "sole jurisdiction". (MacMurray, Vol. I, p. 152.) The Kiaochow convention with Germany, which created the nearest parallel to the Liaotung lease, very specifically provided that the Chinese Government was to "abstain from exercising rights of sovereignty in the ceded territory during the term of the lease and leaves the exercise of the same to Germany". (*Ibid*, p. 114.) That wording showed clearly that there was no intent to have reservation of sovereignty by China mean anything more than the ultimate right to recover the lease after the expiration of the term specified—which, in this case, was not 25, but 99, years. Moreover in another respect the Kiaochow convention differed significantly from that for Kwantung: nothing was said in the latter with respect to assignment of the lease to a third state, while, in the former, it was specifically provided that "Germany engages at no time to sublet the territory leased from China to another Power". The extension of the Kowloon lease made to the British in 1898 superficially was quite similar to the situation at Kwantung in that the military significance of each was uppermost, Kowloon being enlarged in size the better to safeguard Hong Kong. But the lease convention provided that Chinese officials were to continue to exercise jurisdiction in that territory "except so far as may be inconsistent with the military requirements for the defence of Hong Kong". (*Ibid.*, p. 130.) In consequence of disorders in the territory in 1899, Great Britain, by an order in council of Dec. 27, abolished all Chinese jurisdiction there on the ground that the exercise of Chinese authority had proved irreconcilable with the require-

The international legal status of Kwantung, therefore, can best be determined by principal reliance upon the terms of the instrument of lease of March 27, 1898, the character of the instruments of transfer of that lease to Japan in 1905, and the legal factors involved in the extension of that lease to ninety-nine years in the Sino-Japanese treaty and notes of May, 1915. International situations elsewhere in the world may be cited and described where it can be asserted that precedents illustrating mooted points are more or less analogous, and, as will appear, these will serve to demonstrate the entirely unique status not only of leased territories in general but of Kwantung in particular.[4]

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ments of the British for providing for the defense of Hong Kong. Moreover, it is evident that an unique situation exists today with respect to Kwantung for its only close parallel—in limited respects—at Kiaochow has disappeared, and the Liaotung lease was originally granted not to Japan, but to Russia. The extension of the term of the lease in 1915 to 99 years also leads to complications.

[4] It is noteworthy that a Chinese scholar, in a French dissertation which came to the writer's attention while the final manuscript of this work was in preparation, introduces his treatment of Leased Territories in China with the following statement:

"Dans les relations internationales il ne manque pas d'exemples qu'un Etat laisse administrer et exploiter une portion de son territoire par un autre, pour un laps de temps déterminé. Ils sont surtout fréquents entre Nations d'inégale puissance. Pourtant, parmi ces nombreux examples, chacun a son aspect particulier, et, il est à notre sens inexact de les englober sous une même rubrique plus ou moins précise comme la plupart des jurisconsultes du droit des Gens, l'ont fait. Car s'ils présentent en apparence les uns avec les autres certaines analogies, il n'y a pas identité parfaite qui nous autorise à les considérer comme les actes répétés d'une seule et même espèce juridique." (Yang, Léon. *Les Territoires à bail en Chine,* p. 1.)

The Kwantung leased territory is neither equivalent to ceded territory, with full transfer of title to ownership, nor to a lease in perpetuity, because it is limited to a specific term of years. Nor is it properly called an international servitude, in the sense usually attributed to that term by the publicists. It was almost universal at the opening of the century to consider leased territories in China as "disguised cessions"—the publicists, in so describing them, seeking to be realistic in their attempts to establish their status in international law. But this view has required considerable alteration since realism today would at once draw attention to the fact that in practice certain of them have actually been returned to China.

A few illustrations of leases in international law, and of other international situations illustrating this division between the rights of the sovereign state and of the state to which broad grants of authority to exercise jurisdiction are evident. Guantánamo and Bahia Honda, for example, were leases obtained by the United States from Cuba by virtue of executive agreements and in pursuance of a treaty of 1903.[5] The peculiar relation of Cuba to the United States, which has been established by bilateral agreement wherein the United States is actually a sort of trustee for a country which it liberated from Spain, suggests the difference. The Panama Canal Zone exists with nominal sovereignty retained by the Republic

[5] Malloy, *Treaties*, etc., Vol. I, pp. 362, 358, 360.

of Panama, but with jurisdictional rights granted to the United States, i. e., " all the rights, power and authority " over the zone. But the canal treaty of November 18, 1903, gave these rights to the United States " in perpetuity ", limited only by the fact that the territory was acquired for the construction of an inter-oceanic canal, for which object alone the " use, occupation and control " of the zone adjacent to the canal was conceded to the United States.[6] That this limitation was not insignificant is shown by the fact that, faced with a conflicting interpretation of the canal treaty on this very point of jurisdiction, it was necessary to negotiate the Taft agreement of December, 1904, to satisfy both parties. This agreement shows clearly that the United States did not obtain control of the fiscal administration of the canal zone in such matters as customs control, postal system or unlimited right to export the natural products of the land such as minerals.[7] Furthermore, the Panama Canal Zone is not an international political lease, in a strict sense, for there was the element of purchase involved, and additionally the Hay-Banau Varilla Treaty of November 18, 1903, provided that an annual payment of $250,000 should be made to Panama. In a sentence, then, the chief distinction between the Panama Canal Zone and the Kwantung leased territory is that, while, in

[6] Malloy, *Treaties*, etc., Vol. II, p. 1439; *U. S. For. Rels.* 1904, p. 543.

[7] *Executive Orders relating to the Panama Canal* (Wash., D. C.), 1922; Order of Dec. 3, 1904. (Cf. Wright, Quincy. *Mandates under the League of Nations*, p. 395.)

the former, the United States acquired limited rights of jurisdiction in perpetuity, in the latter, the Japanese acquired practically unlimited rights of jurisdiction, but for a fixed term of years.[8]

Nicaragua also presents illustrations of apparent anomalies of this sort. The Nicaraguan Canal Convention of August 5, 1914, ratified in 1916, granted "in perpetuity" to the United States "the exclusive proprietary rights necessary and convenient for the construction, operation and maintenance of an inter-oceanic canal".[9] Jurisdictional rights over the canal route, if and when such a canal were actually constructed, were left extremely indefinite. As for the Corn Islands and the territory to be leased for naval bases on the Gulf of Fonseca, these were leases, which, while not in perpetuity, were renewable after ninety-nine years for a like period at the option of the lessee, the United States. Moreover, it was ex-

[8] The jurisdictional rights granted in perpetuity to the United States in the Panama Canal Zone were not conferred in the form of a lease. Professor Fenwick properly points out that "the term 'lease' is not mentioned in the treaty of 1903 by which (Art. II) 'the Republic of Panama grants to the United States in perpetuity the use, occupation and control' of the zone of land and adjacent territory for the construction of an inter-oceanic canal". (Fenwick, C. G. *International Law*, p. 244.) Dr. Lauterpacht also correctly notes that this "grant in perpetuity" is not a lease. (Lauterpacht, *op. cit.*, p. 185.) Professor E. C. Stowell, therefore, is technically in error in referring to the Panama Canal Zone as "a perpetual lease". (*International Law*, p. 55. 1931 ed.) Similarly, Professor Quincy Wright, in drawing the analogy between this situation and international political leases, is uncritical about the distinction. (*Mandates under the League of Nations*, p. 300. Footnote.)

[9] *U. S. For. Rels.*, 1916, p. 849; *U. S. Treaty Series*, No. 624.

pressly stated that these islands and points to be leased for naval bases were "subject exclusively to the laws and sovereign authority of the United States".[10] The Nicaraguan canal route was granted to the United States, therefore, in perpetuity but not in full sovereignty, and with undefined jurisdiction, while the Corn Islands were granted in full sovereighty for ninety-nine years, renewable at the option of the United States.

Other illustrations of special types of leases might be given, but, because of the necessity of turning inevitably to the conventional bases for each of them, and because it is quite evident that this reveals distinctions between the Kwantung lease and those with which an attempt at analogy might be made, no special purpose, except of confusion, would thus be served. As for the comparison with mandated territories in the Pacific, in Africa or in Asia Minor, it is equally obvious that their status—a question on which there is still very marked difference of opinion among the publicists—is unique. Where sovereignty resides with respect to these mandated territories, especially in the Class B mandates, is a very mooted question, a solution of which would hardly assist our study.[11]

[10] *Ibidem.*

[11] On this subject reference may be made to the article by Professor Quincy Wright in the *Amer. Jour. of Int. Law,* Vol. XVII (1923), pp. 691-703. Cf. Wright, Quincy. *Mandates under the League of Nations;* Margalith, A. M. *The International Mandates;* Van Maanen-Helmer, Elizabeth. *The Mandate System in Relation to Africa and the Pacific Islands.* A conclusion in the latter, is arresting,

2. The False Analogy of Kwantung with Leases in Private Law. Influenced by the presumed analogy of these international territorial or political leases with ordinary leases of real property in private law some writers have used the term "usufruct" to describe the obligations of the lessee to the lessor and the term "servitude" to describe the relationship itself. From this presumed analogy they have gone so far, in some cases, as to declare that the principles of leaseholds in private and municipal law, not only *should be* applicable to such a political lease as Kwantung, but, *are,* under international law, thus recognized. An assertion of Dr. M. T. Z. Tyau, for many years connected with the Foreign Office of the Chinese Government, and now thus situated in Nanking, seems to have been the leading influence in causing several of his countrymen to adopt the same conclusion:[12]

"Since the conveyance is a lease, there are various covenants which a lessee is bound to observe. Some of these covenants are express, and some are implied. The express covenants relate to the reservation of the lessor's rights of

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to say the least: ". . . . The truth is that there is no such thing as sovereignty over the mandated territories because there is nothing even resembling absolute power." (p. 46.) (Cf. Lauterpacht, *op. cit.*, pp. 191.)

[12] Tyau, M. T. Z. *The Legal Obligations Arising out of Treaty Relations between China and other States,* p. 70. It is significant that, for this attempt to draw an analogy between such political leases in international law and ordinary leases of real property in private law, he cites no authority. The great majority of Chinese writers who have adopted the same view have cited Dr. Tyau as above.

sovereignty, the period of tenancy, the non-assignability of the lease. . . . . The second class of covenants are not expressly mentioned, but are implied and well understood. For example, the lessee must remain on good behaviour and conduct himself properly. He is to enjoy the right of possession quietly, and not commit any abuse or nuisance on the leased territory. Further, he is to make use of his usufructuary right so as not to disturb, prejudice, or infringe upon his neighbour's rights. In other words, he must so use his tenement as not to violate the maxim of *sic utere tuo, ut alienum non laedas*. Otherwise, he who suffers from the nuisance committed by him or from the wrong done by him, may secure a redress against him, and, in the last resort, get the landlord to deprive him of possession. Above all, he must restore the original property to the grantor at the end of the lease, and in as good a condition, allowing for reasonable wear and tear, as when the latter first conveyed it to him. Therefore, if when the lease expires, the lessee cannot restore his property to the lessor, the latter has a right to be indemnified by his tenant. If the property restored is one which has greatly deteriorated or depreciated in value, because the lessee has not kept it in good repair, a similar right of indemnification inheres in the lessor."

What strikes one most in reading this quotation is that the language of private law has been drawn upon for description of an international situation in such a manner that the conclusion drawn, in using such terms as " landlord " and " tenant ", " nuisance " and " indemnification ", has become a *reductio ad absurdum*. But, aside from the impracticability and impossibility, in fact, of presuming such an analogy to be at all applicable to an international political lease, it is pertinent to inquire by what authority it has been assumed that international

law, as at present constituted, contains any justification at all for the analogy. Do rules of international law become such merely because one or more writers, after discovering certain useful terminology in private law, apply them in writing to international situations? If international law were thus easily adjusted to the desires and foibles of the publicists it would be no law at all, requiring not even the evidence of a precedent, far less of an international conventional agreement to establish it. The fact is that not only are these international political leases *not* recognized by international law as analogous to leases in private law, but the question whether it is possible to construct an international body of rules and legal principles on the precedents of private law is one on which there is wide disagreement among the publicists.[18]

[18] In order that it may be made evident that this notion applied to leased territories in China is widely prevalent among Chinese writers particularly, some additional quotations need to be made. Dr. Hsia Ching-lin, now president of Medhurst College, Shanghai, adopting Dr. Tyau's thesis *in toto*, has written the following: "And it is the right of the lessor to see that they are not violated or infringed upon. For example, the lessee must remain on good behaviour and conduct himself properly, and not commit any nuisance on the leased territory. In short, he must so use his tenement as not to violate the maxim of *sic utere tuo, ut alienum non laedas*. Otherwise, the landlord may deprive him of his possession. It seems that all the conditions governing 'determination of the lease' in common law are here present. These leases may therefore be defeated or forfeited, before their regular expiration, on the lessee's nonperformance of covenant, by the lessee's tortious alienation, or by the bankruptcy or insolvency (corresponding to the dissolution of the lessee state), and the like." (*Studies in Chinese Diplomacy*, p. 106.) This is from a doctoral dissertation presented to the University

The controversy among publicists in international law as to the degree of application of the analogy between private law situations, rules and terms, with international law, is, of course, an old, old story—at

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of Edinburgh. It is noteworthy that Dr. Hsia here cites in a footnote a "Treatise on Law of Leases" by T. Platt—a purely private law work not intended to describe international law. Similarly, in defining a political lease in international relations, he selects a definition from private law, quoted from the same author: "A lease is a grant or assurance of a present or future interest, for life, for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds."

Similarly, too, Dr. M. J. Bau, in a dissertation presented at The Johns Hopkins University, held as follows: "The lessee states are to enjoy their privileges of tenancy only on good behavior and quiet enjoyment; and should the lessee states prove themselves to be nuisances or menaces to the welfare and safety of the territorial sovereign or other neighboring states, the territorial sovereign who granted the lease would have the right to abate the nuisance or to eliminate the menace. Furthermore, the lessee states must restore, at the expiration of the leases, the leased territories 'in as good a condition, allowing for reasonable wear and tear, as when the latter first conveyed it to him'; and should the territories, on restoration prove to be deteriorated or impaired in any way, due to the negligence of the lessee states to keep them in repair, the territorial sovereign would be entitled to due compensation or indemnity." (*The Foreign Relations of China*, pp. 332-333. 1st ed.) The quotation in context is from Dr. Tyau. No other authorities for this opinion are cited.

Professor Geddes Rutherford in an article on "spheres of influence" states that, as to the rights of the lessee states in leased territories "such rights are strictly, if not narrowly construed". (*American Journal of International Law*, Vol. 20, 1926, p. 322.) As will appear later, this assertion is contrary to law and fact with respect to these China leases. The idea that such leases are international servitudes, and that a private law principle of interpretation should apply to them, seems to have influenced his judgment here, but it is evident that it has no basis in the realities in China. He gives no authority for his statement, and no analysis of the lease conventions.

least as old as Grotius, thus, three centuries. Grotius repeatedly pointed out that analogies with private law should be rejected, though he himself was not strictly puritanic in the matter, and by no means a positivist. H. B. Oppenheim, in the middle of the nineteenth century, contended that the analogy to private law should be rejected or taken *cum grano salis,* as against the assertions of Pufendorff, in the seventeenth century, that the analogy was reasonable. The controversy was waged in the main, between the so-called positivists, who constructed their interpretation of international law from international custom and treaties, and the so-called natural law school, who maintained that the law of nations was derivable from the " law of nature ", and who tended to fall back on the Roman Law.[14]

Between these two schools of law it is, fortunately for our purposes, quite unnecessary to choose. (*Sic!*) What is important to emphasize, however, is that, generally, neither the advocates of the one school nor of the other have accepted without extensive qualifications the application of the terms, principles and rules of private jurisprudence, as of the law of leases, to these territorial leases from state to state. A contemporary and authoritative and searching commentator, Dr. H. Lauterpacht, the Viennese publicist, whose avowed purpose it is to show how reasonable it is to resort to private juris-

[14] Cf. Lauterpacht, H. *Private Law Sources and Analogies of International Law,* pp. 7 ff.

prudence as a source of international law, while defending the use of the term "lease" in its application to these territorial transfers from state to state, merely asserts China's right to recover them at the expiration of their respective terms, and repudiates the assumption that they are but "disguised cessions".[15] Even Dr. Lauterpacht does not appear to contend that the lessee state remains in temporary possession with accountability for its behavior, much less that the lessee state might have to forfeit the lease for having committed a "nuisance" therein.

The fact is that, as one advocate of the analogy of the lease in private law to these political leases of territory from one state to another concedes, "there are, however, persons who are sceptical about such an interpretation of these leases".[16] John Westlake, whose criticism of the Austinian and positivist school[17] did not lead him to confuse such leases in private and in international law, clearly distinguished between them and warned against the assumption that the rules of one can apply to the other:[18]

"When property is leased, the lessor retains a proprietary right which runs concurrently with the lessee's right of enjoyment. If, therefore, the analogy were closely pressed the state which grants a lease of territory would be held to retain all the time some sort of sovereignty over it. This however, would

[15] *Ibidem*, p. 185.
[16] Hsia, *op. cit.*, p. 101.
[17] Westlake, J. *International Law*, Vol. I, p. 8.
[18] *Ibidem*, pp. 133-134.

not suit the parties to such transactions as those which have been mentioned, since the lessee state requires the unrestricted use of the soil for the erection of fortresses and other purposes as well warlike as pacific, while the lessor state would object to the loss of its neutrality which would result from the use by the other of what was in any sense its territory, in or in support of warlike operations against a third."

No one has shown more clearly the practical impossibility of assuming this analogy to be at all applicable than Professor Lawrence, who, perhaps more than any other publicist, realized that such an international situation as evident in the Kwantung leased territory was unique, one for which the usually accepted categories of international law had little or no application.[19]

"As to a lease, we are familiar in our own law with the powers of lessor and lessee. The matter is simple enough when such things as a house or a flock of sheep are concerned. But how does it work out when we have to deal with state authority? . . . . There is no limit to the legal conundrums that might be invented by a little ingenuity. But in order to solve them satisfactorily we must qualify the theories of jurists by considerations drawn from the hard facts of international intercourse. And, after all, old theories which fail to explain new facts are themselves in need of modification. Law was made for men and states, not men and states for law."

" We must remember ", to quote Professor Lawrence, further, " that the administration passed entirely to the lessee states, who not only carried on the government, but erected fortifications, established garrisons, and even dealt with the Chinese

[19] Lawrence, T. J. *War and Neutrality in the Far East*, pp. 270-271.

inhabitants as resident aliens." His own conclusion, as might be expected, is far more descriptive of the real situation in these leases, and more applicable in particular to Kwantung, than any description drawn from an untenable analogy with private law leases. "Bearing these things in mind, we are forced to the conclusion that a lease in international transactions is not the commonplace and innocent affair we know so well in dealings with private property." [20]

Until recently it was almost uniform for French publicists to reject the presumed analogy, here under criticism, on the assumption that such territories were "disguised cessions".[21] It is interesting, however, to note that a Frenchman who, for many years adviser to the Chinese Government, has had opportunities to view these political leases as they are, has also criticized this analogy with private law leases, but on entirely different grounds. Professor Jean Escarra, of the faculty of law in the University of Grenoble, in a preface to a recent disserta-

[20] *Ibidem*, p. 272.

[21] A critical study of this term "disguised cessions" follows. Professor George G. Wilson of Harvard once remarked that, within these leased territories in China, a "positive servitude" was created, describing a servitude as a situation where "a state is under obligation to permit within its territory another state to exercise certain powers". (*Naval War College: International Law Situations*, 1907, p. 13.) He noted however, that "Chinese authority was for the most part at an end within the leased areas". Some years later Professor Wilson, in describing these leases, refrained from applying the term "servitude" to them, calling them "leases". (*Naval War College: International Law Situations*, 1912, pp. 95-96.)

tion by a Chinese scholar, who likewise maintains that this analogy is false and contrary to current interpretation of international law, expresses the following opinion: [22]

"La nature juridique des cessions et des territoires à bail est difficle à déterminer. Pour ne parler que des seconds, le mot bail (*tsou tsie*) évoque une notion courante du droit privé. Apparemment tout se passe comme si l'Etat souverain, propriétaire du sol, se dépouillant, au profit du preneur, de droits inhérents à sa qualité de propriétaire. Et l'on est tenté de soutenir que la Chine, parce qu'elle garde la propriété du sol des territoires à bail, ne serait pas dans une situation différente de celle d'un propriétaire qui loue son immeuble; la maintien de sa souveraineté territoriale compenserait donc pour elle la renonciation volontaire (par traité) à des droits qui seraient normalement les attributs de la propriété.

"Cette vue serait doublement inexacte, d'abord parce qu'elle établirait, entre la propriété du sol et la souveraineté, une relation que tendent à répudier les theoriciens modernes du droit international public, ensuite parce que les catégories du droit privé ne valent rien pour expliquer des situations qui relévent du droit des gens."

This dissertation, for which Professor Escarra has written the preface, is apparently the first instance of a work of a Chinese writer wherein there is a clear departure, based on strictly juristic and realistic grounds, from the attempt to point the analogy of political leases in international law to private leases in the domestic field. The thesis of Dr. Léon Yang

[22] Dr. Jean Escarra's preface to: Yang, Léon. *Les Territoires à bail en Chine*, pp. i-ii.

is built on a case, which he develops convincingly, that these leases in China are unique,[23] that their conventional character necessitates a careful study of the treaty provisions in each case, and that it is quite evident that these political leases are *not* to be considered international "servitudes".[24] This, then, is such a departure from the usual attempt of Chinese writers to draw this analogy that it deserves the emphasis here given it.[25]

[23] *Ibidem*, pp. 2, 7.

[24] Yang, pp. 78 ff.

[25] Among the writers who characterize these international territorial leases as "international servitudes" are Dr. Tyau, Dr. Hsia and Dr. Bau.

Dr. Hsia assumes that the term "servitude" in the private law of England, for example, is applicable both to international law in general and to these political leases in particular. He defines a servitude by choosing a description from municipal law. (Hsia, *op. cit.*, p. 100.) Referring, then, to the Waihaiwei lease he concludes that "this *imperium in imperio* constitutes what is properly known as an international servitude". (p. 101.)

Dr. Tyau, whose authority for this analogy and application of the term "servitude" to leased territories in China has been accepted by Dr. Hsia and others who favor this view, held that "these leases constitute a species of international servitudes, and so will be construed strictly against the beneficiary states". (Tyau, *op. cit.*, p. 68.)

Dr. Bau evidently accepts this view for he cites Dr. Tyau to the point and attempts to describe these leases as similar to leases in private law. Mr. Kao Yin-t'ang, in a more recent essay, presents the same thesis, holding that "a lease constitutes a species of international servitude, and so will be construed strictly against the beneficiary state"—again quoting Dr. Tyau. ("The Lease Conventions in China", in *The Chinese Social and Political Science Review*, Vol. XII, No. 4, Oct. 1928, pp. 530-531.) He, too, holds that the lessee "must remain on good behavior and conduct himself properly" and that "he is to make use of his usufructuary right so as not to disturb, prejudice, or infringe upon his neighbor's rights"—evidently quoting Dr. Tyau without, however, giving any specific authority for his statement.

With regard to this description of international leaseholds as " servitudes ", and the application of the term " usufruct " to describe the obligation of the lessee, attention may first be drawn to the fact that neither of these terms are found in the original lease conventions themselves. Neither term appears in the original Liaotung lease convention of March 27, 1898, though it is interesting to note that the Russian Government did use the term " usufruct " in its statement of January 17/30, 1903, in which it announced that foreign consuls were to apply to St. Petersburg for their exequaturs to reside at Dairen.[26] Westlake, commenting on this announcement which appeared in the Russian press as an official interpretation, remarked: " This may pass as rhetoric, but it cannot be doubted that the practical Russian view is the same as the German ".[27] Now the official German view, which Westlake noted, was that of " the complete transfer of sovereignty for the specified term ", the German Imperial Gazette having announced that China had transferred for the term of the lease " all its sovereign rights in the territories in question ".[28] The fact is, however, that, while Westlake's criticism of the term " usufruct " is acceptable, he erred on the side of presuming that the retention of sovereignty by China was meaningless. It is evident, however, that the situation in these leases in China was " needlessly complicated

[26] *U. S. For. Rels.*, 1903. The phrase "céde en usufruit" is used. *China*, No. 1898, p. 58.

[27] Westlake, *op. cit.*, Vol. I, p. 134.

[28] *Ibid.*, p. 134.

by the introduction of terms derived from Roman law ", and that " the treaty part of the law of nations is precisely that part which is generally considered not to be derived from the Roman law ".[29]

In fact, it is evident that there is no general agreement today among the publicists as to the appropriateness of using the term " international servitude " or that of " usufruct " to describe international situations.[30] To illustrate this, one French writer pointed out the following in 1908: [31]

" La notion de servitude internationale est inapplicable aux traités de bail et de cession d'administration, car ses traités ne se bornent pas à créer certaines obligations pour l'État cédant. Ils contiennent une abdication complète de souveraineté sur un unterritoire, un abandon total de l'*imperium* de l'État sur une partie de ses sujets, placés sous l'autorité exclusive d'un autre État . . . . Le cession même temporaire de territoires ne saurait constituer une servitude, car la servitude, notion juridique de droit privé, ne peut porter que sur des droits réels."

[29] Smith, F. E., and Sibley, N. W. *International Law as Interpreted during the Russo-Japanese War*, p. 18. These writers held that the concessions of China in 1898 are " hardly elucidated by being described as usufructs," and concluded that " the lease of Port Arthur is not an instance of usufruct ".

[30] Holland, in a letter to the London *Times*, April 1, 1898, writing to this point, remarked: " I can recall no other use of term usufruct in international discussion than the somewhat rhetorical statement that an invader should consider himself as an usufructuary of the resources of the country, which he is invading; which is no more than to say that he should use it *en bon père de famille*." The reference is to Grotius, *De Jure Belli ac Pacis*, Bk. I, Ch. IV, Ser. 20. (Cf. *The British Year Book of International Law*, 1925, p. 111.)

[31] Perrinjaquet, J. " Des annexions déguisées de territoires " in *Revue Générale de Droit International Public*, Vol. XVI, 1909, p. 347. Professor Perrinjaquet cites Nys, *Le droit international, les principes, les théories, les faits*, Vol. II, pp. 271-277.

Professor Lawrence, also, drew attention to the impropriety of the Russian Government assuming the term " usufruct " to be applicable to the Liaotung lease. " In Roman law ", to quote Lawrence, " usufruct was the right of using and reaping the fruits of things belonging to others, without destroying their substance ".[32] This, however, while " simple enough when such things as a house or a flock of sheep " are concerned, has no application to these political leases where the element of the sovereignty of a state is involved, along with the unique situation, presented at Liaotung, of complete delegation of all rights to exercise that sovereignty in practice—for purposes of war as well as of peace—to the lessee.

To presume, therefore, that these political leases in international law imposed upon the lessee obligations comparable to those of a lessee of an ordinary piece of real estate in private law is to lay oneself open to the danger of advocating that which is likely to border on the absurd. At least it would be necessary to modify greatly the concept of servitude if it were to be applied at all to such political leases. By just what kind of acts, for example, as of Japan, the lessee in Kwantung province, would it be possible to destroy the substance of the leased territory—by razing a native village, or by tunneling through a mountain? By a strict application of the analogy one might also be led to the inquiry as to

[32] Lawrence, *op. cit.*, pp. 271-272.

what obligations devolved upon the grantor, China, in view of the actual improvement of the territory—by building a city of over a hundred thousand people, and by constructing a hitherto absent road system—for if the rule of private law be applied in one respect, equity at least would require its application upon the lessor as well as the lessee? How measure the significance of a so-called "nuisance" or the value of these improvements? On principles of equity, if it were possible to formulate "damages" against Japan, it should also be possible to assess upon China, which would certainly be the case in Kwantung, several million dollars for improvements to the leased territory. What is sauce for the goose is sauce for the gander.

The Kiaochow convention made some mention of this question of remuneration by China in case the lease were returned before the expiration of the period specified, but the Liaotung convention is silent on the point. If and when a settlement should come about to effect a return of Kwantung to China, it would have to be rather on the basis of political considerations than through any attempt to apply the false analogy of a private law lease to this political lease. States are here involved instead of individuals, and, as there are no entirely analogous situations to Kwantung, and never have been, there are no precedents, and no adequate rules of international law which would offer much assistance. We can conclude, then, with Professor Lawrence that,

with reference to the Kwantung lease in particular, "the use of phrases taken from the law of lease or usufruct, is in its very nature deceptive".[33]

We may repeat, then, that the attempted analogy which a limited few writers may choose to draw between private law situations and these international political leases is not sufficient grounds for assuming that any international law has been *created* by the process. Opinions differ as to just what is international law, but it is quite evident that the opinions of publicists on particular points do not *create* law juristically speaking:[34] such opinions must be reasonable, appropriate to describe, and be declaratory

[33] Lawrence, T. J. *Principles of International Law,* pp. 167-168. (7th ed.)

[34] Aside from the claim of the positivists that international law acquires binding force on a given state only when that state expressly or impliedly accepts a given rule, the development of international law since the eighteenth century has more and more tended to seek into the actual practice of states for a rule of law than to rely on the opinions of publicists. The twentieth century attitude toward the weight to be given the opinions of publicists was given classic statement in the *Paquete Habana* (1899): "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The statute of the Permanent Court of International Justice, while permitting the court to decide a case *ex aequo et bono,* considers the writings "of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". We look, then, to the recognized publicists for unanimity of expression on principles which may not yet have been applied by the courts, and, generally, such opinions are better regarded as *evidence* of what the law really is. The writings of recognized publicists do not, therefore, *create* international law.

of, the established practice of states, and, therefore, require some definite form of international recognition through precedents or state agreement.

With true servitudes in private law the grantor, as an individual person, usually retains more than the mere right of nominal ownership, frequently even possession for most purposes, though private servitudes may, of course, take numerous forms. There is, however, one fundamental contrast with all these servitudes in the private law where individuals, instead of states, are involved, and that is this: sovereign states are involved in international situations, and there is the element of state sovereignty involved in these international cases which is entirely absent from the case of servitudes in private law.[35] In private law of servitudes one individual grants to another a specific "right of harmless use" (*jus utilitatis innoxiae*), while the grantor retains *dominium* over the property or land itself. In international law this element of *dominium* becomes transformed to *imperium*, for here the element of sovereignty is in-

[35] "Private law postulates the existence of a common superior, whereas international law makes a contrary assumption and recognizes the existence of a sphere in which each state is sovereign and master of its own destiny except in so far as it may be coerced by external force." (McNair, Arnold D. "So-called State Servitudes" in the *British Year Book of International Law*, 1925, p. 122.) "When we forsake the field of constitutional or municipal law and enter that of international relations we no longer have to deal with legal superiors and legal inferiors. Here we find no supreme will, but, legally speaking, a collection of equal wills, and the conflict, or at least the interplay of independent powers." (Willoughby, W. W. *The Fundamental Concepts of Public Law*, p. 282.)

volved. The very term " servitude " therefore, becomes a source of suspicion and criticism by responsible officials of governments.[36] International treaties and conventions are not contracts in the same sense as ordinary contracts between legal persons in private law; while it is quite obvious that, as Professor McNair has well pointed out, " the rules as to duress in the two spheres are as different as they could well be, and the *clausula rebus sic stantibus,* though having certain analogies in the Anglo-American rules regarding supervening impossibility would have a devastating effect in the common law of contracts ".[37]

One may admit that international law, can, with caution, derive considerable use from an importation of terminology, in certain instances, from the private law of states, but that this is a process fraught with great dangers is widely admitted not only by the publicists, but by the judges in a series of recent international cases involving this subject of international servitudes. The fact is, that while some publicists affirm the application of the term " international servitude " to relations between states, a large number of them are extremely cautious in borrowing from private law to urge the analogy, while

[36] " States are very sensitive—hyper-sensitive—on the question of sovereignty, and the very word ' servitude ' has an ugly sound in the ear of a sovereign state's legal adviser or representative." (*Ibid.*, p. 122.)

[37] *The British Year Book of International Law,* 1925, p. 122.

others reject the application of the term to international situations entirely.[38]

[38] The doctrine of international servitude, as we know, was very badly "damaged" by the North Atlantic Fisheries Arbitration, in spite of the array of presumed instances cited by the American counsel, Mr. Elihu Root. Mr. Root defined an international servitude to describe "an independent state limiting its sovereignty . . . . so as to permit, and permanently permit, another state itself or through its citizens to have the beneficial use of the territory of the state that limits its sovereignty". The arbitral tribunal, however, declined to accept the doctrine of international servitude as thus defined, on the ground that the doctrine "originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereign states" and held it inapplicable to international situations as "being but little suited to the principles of sovereignty which prevails in states under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign states, has found little, if any, support from modern publicists". (Award of the Tribunal of Arbitration at the Hague, Sept. 7, 1910. Cf. Scott's *Cases on International Law,* p. 263.)

Noteworthy, along with this case, are the several instances where counsel for states have sought to secure recognition of the doctrine of international servitudes without success in the following cases: *The Aaland Islands Question,* in which the Committee of Jurists stated that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted"; and the *Wimbledon Case,* in which the Permanent Court of International Justice in 1923, in its majority opinion, held that the doctrine of international servitude must be "construed as restrictively as possible and confined within its narrowest limits" and that the question whether it was proper to use the term international servitude was a question "which is moreover of a very controversial nature", and that it is doubtful "whether in the domain of international law there really exists servitudes analogous to the servitudes of private law". (*The British Year Book of International Law,* 1925, pp. 114-115.)

There exist recent cases, however, notably *The Dutch Mining Case* (1914) and several cases adjudicated in the Swiss Federal Court, which affirm the doctrine. In a more or less restricted application, Cobbett, Oppenheim, and Fenwick affirm it. On the other hand, Franz von Liszt, de Louter and Niemeyer were generally opposed to

But whether the doctrine of international servitude be accepted or rejected as a sage and wholesome tenet in international law, it is quite obvious that it has no application to the case of international political leases. In the latter case the situation evidently is one of a broad transfer of political and jurisdictional rights to the grantee or lessee state. This is quite different from mere granting of freedom of passage for commercial vessels along an inland watercourse of another state, or of demilitarization arrangements, or of neutralization of a canal.[39] Consequently most publicists do not classify

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the application of the private law of servitude to international situations. De Louter condemned it as a dangerous relic of the early influence of Roman and feudal law; while Niemeyer regarded the attempted analogy as worthless and misleading. Professor McNair, who describes the views of the above publicists, himself concludes that international law "is inclined to reject the offer made by text-writers of a ready-made set of rules borrowed from the civil law of servitudes," and notes that "its cautious reluctance to accept the civil law of servitudes 'lock, stock and barrel' is probably justified by the difference between *dominium* and *imperium*". He concludes, therefore, that "the attempt to apply to these restrictions the terminology and conceptions of the Roman law of servitudes is a legacy of a states system that has passed away and will probably do more harm than good". (*The British Year Book of International Law*, 1925, pp. 111-126.)

We may, then, conclude with Professor Hyde: "It may be greatly doubted, therefore, whether, in view of the differing opinions of statesmen, the term serves to point to definite limitations of control having a distinctive and recognizable character in law. For that reason its use is believed to obscure rather than clarify the perception of what takes place when contracting States undertake to burden territory with restrictions in favor of a non-territorial sovereign." (Hyde, C. C. *International Law*, Vol. I, pp. 275-276.)

[39] Thus, the leases of Guantánamo and Bahia Honda from Cuba to the United States are properly called international political leases, not servitudes. (Fenwick, C. G. *International Law*, p. 262.)

such political leases as the Kwantung lease with servitudes, but call them, more correctly,—*international political leases.* Dr. Lauterpacht, the leading exponent of the private law analogy, deals with such political leases as Kwantung as separate international situations.[40]

In view of these considerations it is more accurate and less confusing to refrain from characterizing the Kwantung leased territory as an international servitude.[41] One need but recall that, during the Russo-Japanese war, this leased territory was regarded by the belligerents, by China, and by outside neutral states very much as if the lease itself were the territory of the leaseholder for all purposes of war and neutrality, the doctrine of international servitude having no application, to realize the inappropriateness of the analogy of these political leases to ordinary leases of property in private law.

[40] Lauterpacht distinguishes between such "political leases" and international leases of a "private law type", the latter including cases where one state grants to another a piece of land for commercial purposes only, or for transit of goods. The distinction is necessary because the question of sovereignty and of political jurisdiction is involved in the political lease. (Lauterpacht, *op. cit.*, pp. 185 ff.)

[41] I find myself, therefore, in complete agreement here with the conclusion of Dr. Léon Yang, whose dissertation on leases in China has but recently been published. (Yang, Léon. *Les Territoires à bail en Chine.* p. 80.)

CHAPTER VII

The Status of Kwantung in International Law

1. The Rule of Construction of Lease Conventions. Dr. Lauterpacht, the Viennese publicist, who has recently published an extremely valuable work on the affinities of private law and international law, has written specifically to the point as to whether treaties, as contracts in private law, and lease conventions in particular, should be construed under the rule of "restrictive interpretation" in favor of the grantor. Accepting the essential identity of treaties with contracts in private law,[1] he notes the tendency of publicists to accept the rule of restrictive interpretation in favor of the state whose sovereignty is affected. He continues: "Now, the maxim of *in dubio mitius* is certainly a well-founded rule of private law, but it is only a subsidiary means of interpretation, subject to the dominant principle which says that effect is to be given to the declared will of the parties and that the compact is to be effective rather than ineffective."[2] Thus, he concludes that, while recent publicists have rendered much lip-service to the principle of "restrictive interpretation" in such cases, so much so that it has almost become a "catchword", "it is obvious that neither the

[1] Lauterpacht, H. *Private Law Sources and Analogies of International Law*, p. 156.

[2] *Ibid.*, p. 179.

science of international law nor international tribunals can, in the long run, act upon such doctrine without seriously jeopardising the work of interpretation ".[3]

Dr. Lauterpacht's general position as to " the alleged principle of restrictive interpretation of treaty obligations ", presumably applicable in favor of the state whose sovereignty is in some way restricted in a treaty, has been emphasized here because, when he deals with leased territories in China, he obviously departs from the very conclusions he has sought to establish. This is done on the assumption that international political leases, established by treaties in which the word " lease " is used, present situations different from those he has previously discussed. Dr. Lauterpacht holds that a legitimate occasion arises for the application of the rule of restrictive interpretation when international treaties " employ *expressis verbis* such technical terms of private jurisprudence as lease, mandate, prescription, purchase, servitude, usufruct, trust, due diligence ".[4] These, he holds, are clear conceptions of private law, perfectly understood by the signatories to treaties containing them, and that, since states themselves have had recourse to such terminology, it must follow that they know and agree upon the concepts

[3] *Ibid.*, p. 180. Dr. Lauterpacht cites dicta from the judgment of the Permanent Court of International Justice in the *Wimbledon case*, and its advisory opinion concerning the Polish Postal Service in Danzig, in support of his position.

[4] *Ibid.*, pp. 181-182.

therein involved when negotiating such treaties. Of all such instances, he holds, "international leases and mandates seem to be best suited for the purpose of illustrating the problem". Thus, his conclusion: [5]

"... Whenever in a treaty a generally accepted term of private law is being used, the interpretation and construction of the treaty must, unless otherwise provided, follow the principles generally recognised as implied in this particular term."

What strikes one, first, with regard to this unqualified conclusion is that, for this general assertion, Dr. Lauterpacht cites no authority, either of publicists or of decisions, judgments or opinions of international tribunals, or furnishes any evidence derived from the practice of states. Such as he does cite, whether the opinions of publicists, the judgments of international tribunals, or evidential fact from the practice of states is clearly in support of a contrary position, evidence strengthening his general position with regard to the non-applicability of the rule of restrictive interpretation, and nowhere made applicable to international leases.[6] Emphatically, it may be said with respect to these China leases that there is no evidence that at any time the practice of states in interpreting their status placed any reliance on private law principles of interpretation of a contract or a lease.

[5] *Ibid.*, p. 190.

[6] *Ibid.*, pp. 178-190. An exception would, perhaps, be Hatschek. To reject the position that these leases are "disguised cessions" is not to compel one to accept the opposite extreme that they are perfectly analogous with leases in private law.

Again, Dr. Lauterpacht holds that the term "lease" is a "general conception of law and a *terminus technicus*".[7] He, therefore, asserts that "it is entirely unwarranted to assume that when used in a public treaty it becomes entirely meaningless, and that it admits of the international ownership, i. e., sovereignty, being vested in the lessee State". In criticism of this assertion it may be said that it may be fully agreed that sovereignty is not possessed by the lessee state without concluding, as does Dr. Lauterpacht, that the term "lease" is entirely meaningless. Objection is rather to his assumption that the signatories to these lease conventions in China did, as a matter of fact, use the term "lease" with a complete meeting of minds as to its private law meaning and the applicability of that meaning to an international situation. The realities of the period compel rather the conclusion that the term "lease" was used, first, as a convenient expression, without any attempt to assume a private law meaning to be applicable, and, second, that, by using the term "lease", the principal legal effect was to declare that the time for possession of jurisdictional rights by the lessee was limited to a specified period. Dr. Lauterpacht, without giving further evidence as to the intention of the parties to these lease conventions, adds support to this conclusion by asserting that, "while it is only natural for the lessee to regard the lease as approaching cession, the

[7] *Ibid.*, p. 189.

intention of the lessor will usually go in an opposite direction ".[8]

Some question may also be raised as to whether the term " lease " is " a general conception of law " in the sense that there is uniformity in the various systems of private law as to its meaning and interpretation.[9] Professor Lawrence, whose contribution to an interpretation of the international legal status of these leased territories has particular value as being a contemporary effort, gave cogent reasons why it would be manifestly improper to assume the application to these leases, particularly to the Liaotung lease, of the powers of lessor and lessee as established in English private law.[10]

A safer rule of interpretation of international political leases, therefore, would be this, that special emphasis should be placed upon the provisions of

[8] *Ibid.*, p. 189.

[9] Dr. Lauterpacht himself cites one illustration which clearly shows that there is not uniformity among private law systems as to the interpretation of ordinary leases in municipal law. " According to Roman, English, and French law, sub-letting is not prohibited unless there is a provision to the contrary in the contract of lease; according to the German and Japanese codes the lessee is, in the absence of an express provision to the contrary, not entitled to sub-let." (*Op. cit.*, p. 188. Footnote.)

[10] His emphasis may here be repeated: " The matter is simple enough when such things as a house or a flock of sheep are concerned," but, in order to solve the status of these international leases " we must qualify the theories of jurists by considerations drawn from the hard facts of international intercourse ". Professor Lawrence, therefore, was forced to the conclusion that " a lease in international transactions is not the commonplace and innocent affair we know so well in dealings with private property ". (*War and Neutrality in the Far East*, pp. 270-272.) (Cf. Westlake, Vol. I, pp. 133-134.)

the conventional agreement in any case, that, in doing so, effort should first be made to get at the true intention of the parties, and that the meaning of such private law terms as " lease ", contained in the convention, should be interpreted in the light of the entire agreement. It would seem, therefore, that, if international law is to conform to the practice of states with respect to these leases, Dr. Lauterpacht's general rule, that the principle of " restrictive interpretation " is " only a subsidiary means of interpretation, subject to the dominant principle which says that effect is to be given to the declared will of the parties and that the compact is to be effective rather than ineffective ", is applicable with full rigor to international political leases, as to the Kwantung lease in particular.

This conclusion would seem to be strengthened by the fact that such international political leases are only confused by reference to them as servitudes.[11] Whatever may be the applicability of the rule of restrictive or strict interpretation to so-called state servitudes—and, as has been presented above, the very question as to whether real servitudes do exist in international intercourse, and are so recognized by international tribunals, is a mooted one—this rule has no application to leases if the practice of states with regard to the China leases be any criterion for finding a rule of law. No international law

[11] Dr. Lauterpacht nowhere characterizes such leases as servitudes and deals with so-called servitudes as separate international situations. (*Op. cit.*, pp. 119 ff.)

is created by the mere assertion, on the part of a few writers, that such leases are servitudes and that the rule of restrictive interpretation ought to be applied.[12]

2. The Real Status of the Kwantung Lease in International Law. In contradistinction to the claim that these international political leases, such as Kwantung, are similar to servitudes in private law, the attempt has generally been to describe them under one or another of four categories. Most commonly they have been considered by the publicists, particularly at the opening of the twentieth century, as "disguised cessions" or territories completely alienated to the so-called lessee state under conditions which are considered to be of no practical significance should the acquiring state choose, at the expiration of the lease period, to retain them in perpetuity. Secondly, they have been characterized as territories over which there exists a form of *condominium* or *coimperium* of the two states concerned, the assumption being that each possesses a portion of the sovereign rights over the territory. Again it has been urged that these leases are to be properly

[12] Cf. Hsia, *op. cit.*, p. 100; Bau, *op. cit.*, pp. 332-333; Tyau, M. T. Z. *Legal Obligations*, p. 68. Dr. Tyau makes the following assertion: "Now, these leases constitute a species of international servitudes, and so will be construed strictly against the beneficiary." (p. 68.) The fact is they have never been so construed. He quotes Professor Hall that "they conform to the universal rule applicable to *jura in re aliena*. Whether they be customary or contractual in their origin, they must be construed strictly." The fact is that Hall did not refer to leased territories when he made this statement. (Cf. Hall, W. E. *A Treatise on International Law*, p. 167.)

described as under the occupation of the so-called lessee state, more or less as similar to occupied territories in Africa or as occupied territories in time of war. Finally, a comparatively small group of publicists has taken the realistic view that these leased territories should not be confused with any of the above situations, but should be regarded simply as international political leases, unique in themselves and exhibiting circumstances under which the lessor state retains formal sovereignty over the territory concerned, but without the right to exercise it for a stated period of time.

The most uniform of these descriptions of leased territories in China, then, has been the attempt to characterize them as " disguised cessions ", cessions of territory, the reality of which has been concealed to serve the *amour-propre* of the so-called lessor state, China, and to veil the hard facts of territorial transfer by phrases which are not to be taken as of international legal significance. This view will be subjected to careful analysis and criticism shortly, but it may be well first to comment upon the less prevalent conceptions which have been held by certain publicists.

The attempt to describe such leased territories in international law as instances of *condominium* or *coimperium* of two states has been influenced by the prevalence of such terminology in private law, an influence which has a dangerous tendency, as in the case of resorting to the term "servitude " to describe

such international political leases, to confuse international situations with private law cases, and to conceal the realities of the *de facto* situations and the definite provisions of the treaty stipulations with hypothetical descriptions derived from non-analogous situations.[13] The actual provisions of the lease conventions themselves, particularly the original Liaotung lease convention of 1898, belie such a description. In the Kwantung leased territory the sovereignty of China was explicitly reserved to the lessor state, while the right to exercise that sovereignty was conceded, for the term of the lease, to Russia, hence to Japan after 1905.[14] This distinction is quite possible in actual practice and is justifiable in strict law.[15] It is not mere legalism, for it is a way of declaring that, by reserving sovereignty over the territory in question the ultimate right of the lessor state to recover the lease at the expiration of the term specified in the instruments of transfer and ex-

[13] Dr. Léon Yang, for example, notes that the status of the Sudan has been described as such an instance of *condominium* under the Khedive of Egypt and the King of England. (*Les Territoires à bail en Chine,* p. 86.)

[14] "This act of lease, however, in no way violates the sovereign rights of H. M. the Emperor of China to the above-mentioned territory." (Art. I, Russo-Chinese lease convention of March 27, 1898. MacMurray, Vol. I, p. 119.)

[15] "Sur un territoire à bail, la souveraineté appartient à l'Etat bailleur et l'exercice du droit d'administration et de contrôle appartient à l'Etat preneur. A l'un appartient le droit et à l'autre est confié l'exercice." (Yang, *op. cit.,* p. 87.) This statement is clearly applicable at least to the Kwantung leased territory, although it may be noted, that in the case of Weihaiwei there was no specific clause which reserved to China sovereignty over the territory.

tension is operative. Moreover, it is quite possible for one state to delegate to another broad, almost entire, and, as the lease in question illustrates, entire jurisdiction to another state and still retain sovereignty over the territory.[16] The practical application of this juristic concept to the case of Kwantung draws attention to China's ultimate right of recovery of the territory, while the original instrument of transfer and the *de facto* situation there illustrates that there is, in fact, no instance of *condominium* or *coimperium* in the actual exercise of administrative or jurisdictional rights in the Kwantung leased territory.

The description of the Kwantung leased territory as "occupied territory" is equally untenable. Whatever application the term might have had to Weihaiwei—and it is believed that the provision that Great Britain should remain in occupation of that territory for so long a period as Russia should remain in occupation of Port Arthur was but a way of describing the indefiniteness of the lease period, and not a proper use of the term "occupation" as ordinarily used in international law—it is quite evident

[16] Cf. Willoughby, W. W. *The Nature of the State*, pp. 196 ff.; *Fundamental Concepts of Public Law*, pp. 324 ff. It is not necessary to accept the Austinian or positivist conception of the state and of sovereignty as exclusive of other theories to admit that these international political leases are not instances of so-called "divided sovereignty". It is evident, however, that the positivist and Austinian view is entirely applicable to the situation of the Kwantung leased territory, for sovereignty there clearly remains in one state only, namely, China. (Cf. Mattern, J. *Concepts of State, Sovereignty and International Law*, p. 188.)

that the term has no proper application to Kwantung. The use of the term "occupied territory" to describe the Kwantung lease is faulty, principally for two reasons: it tends to confuse the situation here under analysis with non-analogous situations; and it leads to the danger of presuming that rules of international law applicable to certain cases of occupation are likewise applicable to Kwantung. Occupation usually refers to military occupation of a territory in time of war, to temporary occupation of territory by one state to prevent external aggression or internal disturbance, and may thus relate to intervention, while it may also describe actual control of a territory, as of hitherto unsettled or so-called "uncivilized" areas without the benefit of a contractual arrangement with the state or territory thus occupied. The case of Kwantung satisfies none of these descriptions.[17]

The status of Kwantung leased territory has been determined by an agreement between two sovereign states; the territory was already settled and in full possession of China before 1898; and it is evident that the juridical status of a belligerent state in occupation of a territory of another in time of war is quite different, and governed by an entirely distinct body of rules of international law, from that which exists *vis-à-vis* Kwantung.[18]

[17] Again I find myself in complete agreement with Dr. Léon Yang, who asserts: "Incontestablement le bail international n'a aucun rapport avec cette définition". (Yang, *op. cit.*, p. 88.)

[18] Thus, the Japanese military, upon belligerent occupation of the Kwantung leased territory about Port Arthur during the Russo-

But the attempts to characterize leased territories in China as illustrations of *coimperium* of two sovereign states or as occupied territories have been less frequent than the description of them as "disguised cessions", and those terms have apparently been as often the result of somewhat careless use of legal terminology, without serious attempt to insist on their intrinsic applicability, as they have been intentionally chosen to describe the realities.

Particularly for the first decade of the twentieth century were most publicists, especially the continental, and more particularly the French publicists, inclined to describe these leases in China as instances of "cessions déguisées". Influenced, as they were, by presumed analogies in Africa, by their eventual fate, by the historical facts which gave rise to the view that China might eventually become similarly dismembered and these territories absorbed in complete cession by the lessee states, the view was natural, particularly for the publicists who endeavored to interpret international law so as to conform those rules to the realities of international intercourse. They concluded, therefore, that the fine phraseology of the instruments which transferred these leases to foreign states was not to be taken too seriously; that the intent of the lessee states was evident enough; that China's intent was mainly to

Japanese war, were subject to the international law of belligerency until the formal transfer of the leased territory to Japan was effected by the treaty of Portsmouth, and the Sino-Japanese treaty of Peking of Dec. 22, 1905. (Takahashi, *op. cit.*, pp. 252 ff.)

" save her face " internationally; and that the time limits set in these conventions were evidently not to be taken at their face value for, while adequate to serve China's *amour-propre,* they did not preclude renewal indefinitely.[19] A representative view of this French school, also one of the earliest statements after the acquisition of these leases in China, will serve to illustrate this reasoning:[20]

" Il consiste essentiellement en une convention bilatérale, d'apparence parfaitement libre et normale, par laquelle un propriétaire d'un sol loue l'habitation de ce sol à un pays, qui devient son locataire. La cession à bail comprend l'usage du sol, la récolte de ses produits, le droit d'y bâtir, de le fortifier; elle donne au locataire le droit de s'y conduire en propriétaire véritable, et ne conserve au cessionaire que la nue propriété. Ainsi la souveraineté demeure au propriétaire; mais ses droits et son exercise lui sont ravis. . . . . Et personne, non plus que les spectateurs, n'est dupe de la comédie. Au bout du temps fixé, le propriétaire peut avoir perdu la mémoire de son droit; et le locataire, celle de son engagement; ce dernier est dans la merveilleuse situation d'un homme qui occupe une maison contre le gré du propriétaire, mais s'y est barricadé fortement et attend que la force publique l'en déloge. Mais, en politique, la force publique internationale, qui

[19] Dr. Léon Yang seeks to distinguish between the descriptions of these territories as " cessions déguisées " and instances of " aliénation " or " annexion ". For this, I find little, if any, justification. The description of the latter was always accompanied with a belittling of the convention clauses aiming to preserve China's ultimate sovereignty and right of recovery, and, therefore, was but another way of describing them as " disguised cessions ". (Cf. Yang, *op. cit.,* pp. 82, 91.)

[20] Pouvoirville, A. de. " Les fictions internationales en Extrême-Orient ", in *Revue Générale de Droit International Public,* Vol. VI, 1899, pp. 118-119.

serait représentée à peu près par un arbitrage, ne se dérange point pour expulser un locataire tout puissant, qui au bout de longues années, déclare prendre l'usage d'un droit pour le droit lui-même, et s'approprie, sous le regard complaisant de univers, la nue propriété avec l'usufruit. Rappellerons-nous que l'île de Hong-Kong fut primitivement cédée à bail aux Anglais?. . . . Seulement, et malgré la duplicité et l'hypocrisie évidentes d'un tel instrument, il demeurera toujours parmi les plus agréable à ceux qui sont contraints de recourir à l'un quelconque des moyens diplomatiques modernes, parce qu'il ménage l'amour-propre des deux contractants: l'amour-propre de celui qu'on dépouille, qui n'a pas l'air de céder, et qui, *en droit,* ne cède pas sa souveraineté; et l'amour-propre et la respectabilité de celui qui s'approprie, parce que son larcin se parfait à longue échéance, et parce que ceux qui le commettent peuvent se dire forcés par l'acte 'insuffisant' que d'autres ont signé."

This thesis, maintained even more rigorously by other writers of the French school of "disguised cessionists", was maintained notably in two dissertations for the doctorate, by M. L. Gérard, before the faculty of Nancy in 1903, and M. Jean Perrinjaquet, before the faculty of Bordeaux in 1904.[21] Dr. Gérard maintained that, as evidenced by the abnormality of the undertaking ostensibly described in the lease convention, this procedure was merely a device for annexation of territory. In the nature of the case the lessee state, having been given the right to exercise exclusive jurisdiction in such territory, was the sovereign *in fact.* They, in his view, thus became "dis-

[21] Gérard, L. *Des cessions déguisées de territoire en droit international.* Nancy, 1903; Perrinjaquet, J. *Les cessions temporaire de territoire.* Bordeaux, 1904.

guised cessions ", producing all the logical consequences of outright cession.

Dr. Perrinjaquet similarly held that, if these conventions were viewed in their totality, the net result would appear to be that the actual sovereignty over the leased territories would be seen to have been transferred to the so-called lessee state, at least for the period of the lease. He admitted that these conventions, for the most part, contained specific clauses reserving nominal sovereignty to the lessor, but asserted that this formal reservation did not accord with the realities evident in each case. Moreover, he held that, in spite of the more or less definite fixation of dates for the termination of these leases in China, the so-called lessee states would likely forget them, and that the lessor might well regard them as a *trompe l'oeil*—an illusion.[22] Hence the conclusion that these leased territories are but " cessions déguisées ". Elsewhere Dr. Perrinjaquet maintained the same thesis:[23]

" Dans tous ces cas, si on analyse les traités avec soin et si on en dégage le caractère réel, on s'aperçoit bien vite que la cession d'administration et le bail temporaire constituent des annexations pures et simples, accompagnées parfois d'une vague promesse de restituion à terme dont nous aurons à apprécier la sincérité."

[22] Cf. Criticism of M. Perrinjaquet's thesis by Dr. Léon Yang, *op. cit.*, p. 94.)

[23] Perrinjaquet, J. " Des annexions déguisées de territoires ", article in *Revue Générale de Droit International Public*, Vol. XVI, 1909, p. 345. A similar view was expressed editorially in this journal in 1908, Vol. XV, pp. 124-125.

These views are characteristic of a dozen French publicists whose statements might be given, including those of Despagnet, Fauchille and Mérignhac, who characterized these leases with the following phrases—" cession déguisées ", " prétendues cessions à bail ", " annexion véritable " or " une véritable aliénation du territoire ".[24] Similarly, the Belgian publicist, M. Nys, after quoting Gérard and Perrinjaquet, and pointing out that the sovereignty of the lessor state is formally reserved in these conventions, concluded that " the cession by lease involves the forfeiture [déchéance] of the ceding state ".[25] Louter, the Dutch publicist, saw in these lease conventions a means of ultimate annexation.[26] The German writers, Franz von Liszt and Laband, may also be described as " disguised cessionists ".[27]

With a few notable exceptions British and American publicists have been inclined to the same view.

[24] Cf. Despagnet. *Cours de droit international public.* 4th ed. Paris; Fauchille. *Traité de droit international public.* 1921-1925, Paris; Mérignhac. *Traité de droit international public.* 1905-1907, Paris. " We must then agree with Despagnet who, after remarking that the restoration of the territory at the end of the specified term is very unlikely, says that these pretended leases are alienations disguised in order to spare the susceptibility of the state at whose cost they are made." (Westlake, J. *International Law,* Vol. I, p. 134.) (Cf. Yang, *op. cit.,* pp. 91 ff. This gives a brief review of the views of the above-mentioned publicists and a criticism of them.)

[25] Nys. *Le droit international.* Brussels, 1912. Cited by Yang, *op. cit.,* p. 96.

[26] Yang, *op. cit.,* p. 96.

[27] *Ibid.,* pp. 97 ff. Dr. Yang quotes the Japanese writers, Yoshitomi and Takahashi, as agreeing that these leases should be considered but situations inevitably leading to complete annexation by the so-called lessee state.

John Westlake, while rejecting the analogy with leases in private law, concluded in entire agreement with Despagnet, favoring the view that these leases are "disguised cessions" since that apparently was the official view of the German and Russian governments, and since, he held, one should not be disillusioned by the terms of the lease conventions, which, noticeably, made no provision for rental of any sort.[28] Lawrence doubted that the lessor, China, retained sovereignty over the lease, evidently much as did Gérard and Perrinjaquet. He concluded that these leases in China were "cessions of territory for a term of years, and it may be added that restoration at the end of the term is often somewhat problematical".[29] Of Kwantung in particular he wrote in 1904: "The words which reserve the sovereignty of the lessor are fine phrases used for the purpose of disguising the reality of territorial transfer."[30] Phillipson, who admited that strict law and practice differed in the case of such leases, concluded that the practice was definitive in that as such they were evidently "disguised cessions and amount, therefore, to complete alienations".[31] Addressing himself to these leases in general, Cobbett asserted that they "are for the most part only alienations in disguise".[32]

[28] Westlake, *op. cit.*, p. 134.

[29] Lawrence, T. J. *A Handbook of Public International Law*, p. 57. (10th ed. by P. H. Winfield.)

[30] Lawrence, T. J. *War and Neutrality in the Far East*, p. 207.

[31] Phillipson, C. *International Law and the Great War*, p. 276.

[32] Cobbett, Pitt. *Cases and Opinions on International Law*. Vol. I, p. 110. (3rd ed.) This agrees with Oppenheim, *op. cit.*, Vol. I, p. 364. (4th ed., 1928.)

The Earl of Birkenhead evidently considered such leases as but stages toward complete annexation, to be accomplished " in the easy graduation of the assimilative process " which might be expected from the broad grant of jurisdiction to the lessee. Thus he concluded that " if a European country obtains a ' lease ' from China, fortifies its acquisition, and undertakes responsibility within its limits, no devices of nomenclature can disguise the charge which has been covertly effected ".[33] More recent writers evidently incline to the same view. Brierly refers to these leases by conventional agreement as " no more than a diplomatic device for rendering a permanent loss of territory more palatable to the dispossessing state by avoiding any mention of annexation and holding out the hope of eventual recovery ".[34]

American publicists have less frequently written to the point, but it appears that, when they have, many have been somewhat incautious, relying, in the main, upon continental writers for their opinions. Professor Hershey, who cites as his authority L. Gérard, J. Perrinjaquet and A. Pouvoirville, and notes Westlake's agreement on this point, naturally concludes that these leased territories in China " have aptly been described as disguised or indirect cessions ".[35] Dr. Edmunds, characteristically ex-

[33] Earl of Birkenhead (F. E. Smith), *International Law*, p. 64. (1900 ed.)

[34] Brierly, J. L. *The Law of Nations*, pp. 97-98.

[35] Hershey, Amos S. *Essentials of International Public Law*, pp. 184 ff.

treme and not particularly careful about terminology, calls them " disguised cessions ", adding that " the League of Nations cares nothing for little obstacles of that kind, however, when the beneficiary is one of the Great Powers ".[36] Professor E. C. Stowell, in a recent volume, while citing Dr. Lauterpacht's criticism of the term " disguised cessions ", evidently prefers to conform with the popular view: " In order to avoid irritating national susceptibilities and arousing international jealousies through a cession or annexation, acquisition of territory is sometimes disguised as a lease. . . . . Various portions of China have been made the object of a lease, as that of Kiao-Chau in 1898 to Germany ".[37] He does not distinguish the lease in China from the general category which he calls instances of disguised acquisition. Many leading American publicists do not seem to have written especially to the point at all.[38]

Where such an array of distinguished publicists in international law appears in strong support of

[36] Edmunds, Sterling E. *The Lawless Law of Nations*, p. 84. Dr. Edmunds is slightly in error in asserting that the Kwantung lease was explicitly non-assignable in the original lease convention of 1898.

[37] Stowell, E. C. *International Law:* a restatement of principles in conformity with actual practice, pp. 341-342.

[38] John Bassett Moore, in his monumental *Digest*, discusses only the question of extraterritoriality in respect to leased territories in China. (Moore's *Digest*, Vol. II (1906), pp. 639 ff.) Professor C. G. Fenwick, however, calls them for what they are, " leases " in international law—but does not distinguish political and commercial leases, and notes that in these leases in China " the sovereignty of the lessor state over the territory is more nominal than real ". (Fenwick, *International Law*, pp. 243-244.)

the assertion that these leased territories in China, including the Kwantung lease, are properly to be characterized in international law as "disguised cessions" it is with some diffidence that a firm dissent may be entered against them. But in doing so, a point of view will be presented which, it is believed, would be entirely acceptable to a majority, especially of the recent publicists, because attention is here drawn to an unique situation which apparently has too often been presumed to have precedents and analogies in other places of the world, especially in Africa. The publicists cited have generally addressed themselves more directly to political leases in general, not to leased territories in China, or to the Kwantung lease in particular. However true their general assertions may have been, as evidenced by the incontrovertible facts of the dismemberment of Africa, they have no exact application to China, which is neither dismembered, nor likely to be, nor devoid of sufficient international prestige to bring about, what already has been evidenced by the cases of Kiaochow and Weihaiwei in Shantung province, the eventual recovery of one or more of the remaining leased territories still extant.

The phrase of the late Professor Lawrence, who himself held that the lease of Port Arthur and of Dalny (Dairen) was an instance of a "disguised cession", reoccurs with added utility here: "We must qualify the theories of jurists by considerations drawn from the hard facts of international inter-

course." This concept of international political leases in China as but veiled cessions of territory to the so-called lessee states was, at least in one sense, justified by the historical circumstances which gave them inspiration. No one could anticipate then what the future had in store for China or for these leases in particular. It was an era of foreboding portents in a China weakened and humiliated by the "race for concessions" of 1898 and the Boxer Rising which followed. It looked like another Africa to some observers! But times have changed: China has recovered two of these territories, one as recently as 1930. China has become a world power of no small importance; has occupied a non-permanent seat in the Council of the League of Nations, and has shown considerable vitality with respect to recovery of numerous foreign privileges in China granted in the nineteenth century. Thus, the phrase of Professor Lawrence, which he himself would perhaps be only too ready to apply to this changed situation were he living, that "old theories which fail to explain new facts are themselves in need of modification", has emphatic application here. "Law", said he, "was made for men and states, not men and states for law".[39]

[39] Lawrence, T. J. *War and Neutrality in the Far East*, p. 271 (1904). "Although the China leases were looked upon by some as veiled cessions, it now seems recognized, especially since the return of some of them to China, that Chinese sovereignty in the areas continued in spite of her lease of full powers of administration for a term of years." (Wright, Q. *Mandates under the League of Nations*, p. 395.)

This is not to say that there is any greater definite assurance that the Kwantung leased territory, now held by Japan under the extended term until 1997, is likely to be restored in the near future. It is to say, however, that there are now precedents for such recovery of the leases by China, and that, even with respect to Kwantung itself, the Japanese Government officially has taken a view of the international legal status of the territory in lease which repudiates the concept of " disguised cession ". The phrase itself has never had definite official usage—naturally. With respect to Kwantung, the Japanese Government, by resorting to legal, if strong and unusual, means to extend the period of the lease beyond the original date of expiration (1923) to ninety-nine years, by that very act officially admitted that Kwantung is an international political lease—a lease not a cession of territory in perpetuity.[40]

There are, however, additional considerations which may be adduced to criticize the application of the term " disguised cessions " to these leased

[40] Professor Quincy Wright well describes the difficulties involved in situations where one state possesses sovereignty over a territory within which another has rights of jurisdiction, asserting that these legal distinctions are acquiring greater practical importance as international law is gaining sanctions through international organization. He correctly notes that " while before the war it was customary to refer to Chinese leases as veiled annexations, few would so consider them today ". (*Mandates under the League of Nations,* p. 372.) Again: " Leases under international law either for a term of years or in perpetuity give clear evidence of the customary recognition of the possibility of dissociating sovereignty from its exercise." (*Ibid.,* p. 394.)

territories in China, even as of 1898. The Chinese Government at the time may have preferred the term "lease" to "cession in perpetuity" for purposes of preserving their own self-esteem and forfending the political storm which may have broken earlier had these leases been definitely alienated to foreign sovereignties. But, *in strict law,* there is no evidence in those lease conventions that the *intent* of China was identical with that of the parties described as the lessees. There is evidence, however, that the Chinese Government did not regard them thereafter as territories completely alienated; in the case of Kwantung, for example, protracted negotiations took place between Russia and China during 1901 to 1903 with respect to specific jurisdictional rights in this leased territory. It would, then, be highly presumptuous on the part of the lessees, and illogical in strict law, to assume that the *reservatio mentalis* of the lessees alone gave adequate grounds for constructing a legal principle that these leases were other than what they were called in the instruments of lease.[41]

[41] Rejecting the theory that these leases in China were properly described as "disguised cessions", an entirely tenable and hitherto almost unheard of emphasis has come from the Viennese publicist, Dr. H. Lauterpacht. "It is submitted", he says in criticism of this concept, "that this view is neither sound in law nor in accordance with the provisions of the treaties in question as interpreted by the actual practice." (*Private Law Sources and Analogies of International Law,* p. 185.) He is rightfully emphatic that it is necessary to consider the intention of both parties to these lease conventions, if one is to be realistic and juristic. I do not find, however, as Dr. Lauterpacht apparently does, any evidence which would describe the in-

This is not to say that the texts of the lease conventions themselves did not generally concede an almost complete waiver of jurisdictional rights in favor of the lessee states. But the assumption that China gave " tacit consent " to this idea of " disguised cession " is neither evidenced by facts which can be adduced to describe China's real intent, nor justified by subsequent circumstances.[42]

What did actually occur in the case of these leased territories in China, including the Kwantung lease to Russia and later to Japan, was that China retained the formal right of sovereignty over the territories in question, but without the right to exercise it in the ordinary way during the period of these leases. The reservation of sovereignty, however much the right to exercise jurisdictional authority for the period of the lease was granted to the lessee state, was by no means a fiction. In some cases, as originally at Kowloon, opposite Hong Kong, until December of 1899 at least, this reservation of sovereignty

tention of China, since the lease conventions themselves generally do not describe China's rights under her reserved sovereignty, and, in the case of Weihaiwei, there was no specific reservation of China's sovereignty at all. It does appear that China's intent clearly was to provide for eventual recovery of the leases—if, and when.

[42] " Il est possible, il est même plus que probable que l'intention de l'état preneur est telle. Mais la Chine pense autrement. Assaillie, menacée par une force militaire supérieure, en pareilles circonstances elle tâche tout naturellement de sauver tout ce qu'elle peut sauver dans la convention imposée. . . . . On dit alors que les intentions de l'Etat preneur doivent primer celles de l'Etat bailleur, car il est, en l'espèce la partie principale, étant donné que l'Etat bailleur droit s'incliner et se conformer à sa volonté. C'est donc le droit du plus fort! " (Yang, *op. cit.*, p. 101.)

was accompanied by a declaratory statement of specific rights of jurisdiction which might still be exercised by China. So also at Kwantung at the outset, for there were certain clauses in the original lease convention of 1898 which reserved minor jurisdictional rights to China. That these lapsed long before the Japanese obtained possession of the Kwantung lease is evident. In the case of Kwantung, then, this reservation of sovereignty would have been almost a fiction in fact but for one consideration: there is a time limit fixed for this lease, and that is sufficient evidence of the existence of Chinese sovereignty over the lease itself, aside from the explicit statement in the convention of lease that the lessor retains sovereignty.

In strict law, then, China remains the sovereign, but without the right to exercise the usual rights of sovereignty. Few have been the publicists who have recognized this view, but it is obvious that contemporary facts have increased the number of them. Oppenheim, who admitted that "for all practical purposes" and during the period of the leases these were similar, as far as exercise of jurisdiction was concerned, to "cessions of pieces of territory", nevertheless, pointed out that "on one and the same territory can exist one full-sovereign state only" and that, therefore, leased territories were "apparent, but not real, exceptions to the rule".[43] Sir Thomas Barclay, who presented to the session of the

[43] Oppenheim, L. *International Law*, Vol. I, p. 361. (4th ed. 1928.)

Institute of International Law at Florence in 1908 a proposal with respect to the responsibilities of states actually in possession of protectorates, spheres of influence and leases, took issue with Westlake's view that these political leases were " disguised cessions ".[44]

Refusing to accept the theory of " disguised cession ", the German publicist, Ullmann, drew attention to the situation at Kiaochow, both in strict law and in fact, and, although this political lease has generally been regarded as the most conspicuous example of a lease originally intended to be permanent and to tend to become actually annexed territory, he dissented. His dissent is clear and tenable. It is based on a distinction between the reservation of sovereignty to China, meaning here principally the right to recover the territory at the end of ninety-nine years, and the delegation of the right to exercise jurisdictional authority there for the term of the lease.[45] Actual annexation, he pointed out, had consequences not evident at Kiaochow: the Chinese residents could not be considered in any sense German nationals until they had been naturalized. The situation at Kwantung is identical in that the Chinese residents did not become Russian, or later Japanese nationals, by the convention of lease. Nor has any provision been made since then for acquisition of Japanese nationality by them. Potentially these

[44] Cf. Yang, *op. cit.*, p. 103.
[45] Yang, *op. cit.*, p. 104 .

leases might have tended to become cases of actual ceded territory in perpetuity and full sovereignty, but actually they are not.[46]

In conclusion, then, it is evident that the only accurate description of these international political leases in international law, and the only adequate description which accords entirely with the realities of the situation, is that which calls them for what they are—*international political leases.* No useful purpose is served by confusion of them with other international situations such as servitudes or cessions, or with superficially similar cases which, upon analysis, appear to have entirely different characteristics and furnish no precedents.[47] The Kwan-

[46] Professor George Grafton Wilson of Harvard, in his lectures given to the Naval War College, made this situation quite clear as early as 1912. "The idea that the lease was in fact an actual alienation of the territory seems to be contrary to law and contrary to fact, though it may be that such leased territory may, at some future time, more easily pass under the actual ownership or sovereignty of the lessee." (*Naval War College: International Law Situations,* 1912, p. 96.) Some years earlier he had suggested that there was the element of a "positive servitude" in these China leases, but noted at the time that "Chinese authority was for the most part at an end within the leased areas". (*Naval War College: International Law Situations,* 1907, pp. 13-15.)

[47] Thus, Dr. Lauterpacht advisedly defends the term "lease" to apply to these international political leases in China. (*Op. cit.,* pp. 188-189.) Also, Dr. C. G. Fenwick properly calls them "long-term leases . . . . without prejudicing the formal sovereignty of the lessor state". (*International Law,* pp. 243-244.) Dr. Léon Yang, who apparently has subjected these leases in China to the most thorough scrutiny of any recent writer, concludes: "Le bail entre Nations est tout uniment un bail du droit international. Baptisons-le 'Bail international', si vous voulez. Il est un phénomène nouveau, un acte juridique *sui generis* dans les rapports entre les Nations. Il ne faut

tung leased territory is an example of such an *international political lease* where the sovereignty of the lessor state, China, is safeguarded by the explicit right to recover the territory upon the termination of the lease period, but where, for the remaining years of the lease, the jurisdictional rights of Japan are practically unimpaired. Were international law to square with the actual facts of the *de facto* situation evident there ever since 1905, when Japan acquired the lease, and to take adequate account of the provisions of the original document of transfer of 1898, it would be necessary to state clearly that sovereignty, on the one hand, the ultimate authority over the territory, the very source of the delegated powers given to Japan, and, on the other hand, jurisdictional rights are two separate and distinct things.

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pas le confondre avec une catégorie d'acte préexistante quelconque du droit des Gens. On ne peut pas non plus le comparer avec l'institution des baux du droit privé." (Yang, *op. cit.*, p. 107.) Cf. Wright, *op. cit.*, pp. 394-395.)

CHAPTER VIII

The Extension of the Lease Period

1. The Legality of the Sino-Japanese Treaty and Notes of 1915. The international legal status of the Kwantung leased territory since 1923, the year for the expiration of the term of the original lease given to Russia, naturally depends upon the validity and binding force of the Sino-Japanese treaty and notes of 1915 which extended the term to ninety-nine years, i. e., to 1997. The general circumstances attending these negotiations, the far-reaching political significance of the so-called " Twenty-one Demands " imposed upon China during those months preceding May, 1915, and the Japanese resort to an ultimatum to compel China to accept certain of those demands, are well known. Questions of policy and of international morality, however, are not germane here except in so far as they may affect the actual juridical character of the agreements which eventuated from those circumstances. Moreover, those negotiations were conducted in such a manner, especially as manifested in the still somewhat clouded rôle of Count Okuma and President Yuan Shih-k'ai, that it is exceedingly difficult to venture judgment either on the intrinsic unethical character of the whole affair or on the binding force of those agreements if the approach be exclusively from moral considerations.

We are concerned here solely with the juristic question as to whether Japan remained in lawful occupation of the Kwantung leased territory after March, 1923. Japan has, of course, remained at least in *de facto* occupation of the leased territory throughout the period from 1923 to the present. Moreover, the Chinese Government has not officially maintained the position that the period of Japan's lease actually terminated in 1923. This may be surprising to some, but the import of this statement is clarified by the assertion that the Chinese Government, neither at the Paris Peace Conference, nor at the Washington Conference, nor in the communication to the Japanese Government in March, 1923, actually declared that they would not in future be bound to observe Japanese authority in Kwantung. What the Chinese Government have officially done is to declare two things, first, that the treaties and notes of 1915 exist but *should be abrogated,* and second, that China reserves the right to open the question whenever she believes an opportune moment has come for doing so. Both of these declarations are of practical legal significance.

China's first opportunity to make an official statement of attitude with respect to the international legal validity of the Sino-Japanese treaties and notes of May, 1915, came on the very day Japan submitted the ultimatum of May seventh. The Chinese Government on that day published an official statement which was, in fact, a protest, characterizing the Jap-

anese action as "drastic" and conducted with "unusual procedure", drawing attention to the fact that the Japanese demands were unprovoked and without a *quid pro quo*.[1] There is, however, no suggestion therein of an intention to question the binding validity of the agreements about to be concluded, and no statement of intention to abrogate them. Naturally, such a statement was precluded by the very nature of the demands and embarrassments which China would have had to suffer at the hands of the government demanding submission actually under threat of military force.

At the Paris Peace Conference in 1919 the Chinese delegation submitted several memoranda having some relation to this question, the most of them relating especially to Shantung. China's principal legal claim for recovery of Shantung was neither the non-assignability of the Kiaochow lease, nor the allegation that *force majeure* had attended the negotiations of 1915, but rather that the right to recover Shantung was based on China's declaration of war against Germany which was declared to have terminated the Sino-German lease convention with respect to Kiaochow.[2] The latter contention has no bearing on the

[1] *The Sino-Japanese Negotiations of 1915* (Japanese and Chinese Documents and Chinese Official Statement), pp. 64 ff. Carnegie Endowment for International Peace, 1921.

[2] Quigley, H. S. "Legal Phases of the Shantung Question", in *Minnesota Law Review*, April, 1922, pp. 380-382. Lansing, Robert *The Peace Negotiations*, p. 250; Dillon, E. J. *The Peace Conference*, p. 285. In reply to these memoranda the Japanese delegation offered several rejoinders, among them the following: "By concluding the agreement of September 24, 1918, China bound herself not to con-

status of the Kwantung leased territory. The Chinese delegation, however, did incidentally suggest the right of abrogation of the 1915 agreements on the ground that they were imposed upon China with attendant *force majeure:* "The 1915 agreements were, however, concluded by China under coercion of a Japanese ultimatum threatening war".[3] What China did at the Paris Peace Conference, therefore, was to declare that coercion had attended those negotiations, that consequently China reserved the right to open the whole question of the validity of the 1915 agreements at a subsequent date, but did not declare them to be either abrogated or non-enforceable for the time being. China also sought to invoke the principle of *rebus sic stantibus,* but was answered on this point by a Japanese memorandum.

At the Washington Conference, however, the Chinese delegation gave additional reasons why the 1915 agreements relative to South Manchuria, i. e., including the extension of the Kwantung lease, should be abrogated. The Chinese delegation did "raise the question as to the equity and justice of these agreements and therefore as to their fundamental validity".[4] Dr. C. T. Wang clearly took the position that

test the validity of the Treaty of May 25, 1915, of which it is a sequel." (Gallagher, Patrick. *America's Aims and Asia's Aspirations,* p. 304.)

[3] Letter of the Chinese Delegation to the Peace Conference, May 4, 1919, printed in Wood, G. Zay, *The Shantung Question,* pp. 124-125.

[4] *Conference Proceedings,* p. 332; Willoughby, W. W. *China at the Conference,* p. 255. Statement of Dr. C. T. Wang in the 31st meeting of the Committee on Far Eastern Affairs, Feb. 3, 1922. Sixth Plenary Session, Feb. 4.

the Chinese delegation was not "disposed to rely solely upon a claim to the technical validity of the agreements of 1915", but rather on expediency, in the interest of preserving peace in the Far East, and on moral grounds.[5] He, therefore, stated that the treaties and notes of May 25, 1915, "should form the subject of impartial examination with a view to their abrogation". China, therefore, had not abrogated those agreements.

The Chinese delegation then advanced four reasons why China desired abrogation:

1. "In exchange for the concessions demanded of China, Japan offered no *quid pro quo*. The benefits derived from the agreements were wholly unilateral."

2. "The agreements, in important respects, are in violation of treaties between China and the other powers."

3. "The agreements are inconsistent with the principles relating to China which have been adopted by the conference."

4. "The agreements have engendered constant misunderstanding between China and Japan, and, if not abrogated, will necessarily tend, in the future, to disturb friendly relations between the two countries. . . ."[6]

These declarations were made "in order that the Chinese Government may have upon record the view

[5] *Conference Proceedings*, p. 332.
[6] *Ibid.*, pp. 332, 1558, 1084.

which it takes, and will continue to take, regarding the Sino-Japanese Treaties and Exchanges of Notes of May 25, 1915 ". The second, third and fourth reasons have little or no bearing on the juristic status of the Kwantung leased territory, except in so far as the reservation of right attached enables China to reopen the question of the extension of this lease.

The status of leased territories in China received special attention at the Washington Conference and in that discussion the question of Kwantung was considered along with the others. The economic, political and strategic importance of Kwantung to China was described in detail, but, when the Japanese delegation gave similar reasons for remaining in occupation, the Chinese delegation did not take the position that the Japanese rights were only *de facto* and not *de jure*. The Chinese delegation, however, reserved the right to seek a solution of this general question " on all future occasions ".[1] The international legal status of Kwantung was not, therefore, directly affected by the Washington Conference, and only indirectly, in so far as the indefinite promises of other powers to return their leases may furnish precedents.

In the absence of the Sino-Japanese treaty and note of 1915, which extended the lease of Kwantung to the year 1997, the original lease of 1898 would have run its twenty-five year period on March 27, 1923. On March 10, therefore, the Chinese Gov-

[1] *Conference Proceedings*, pp. 1556-1560.

ernment addressed a note to the Japanese Government urging that the 1915 agreements, which had extended the term of the lease, should be considered abrogated. The Japanese Government replied with a categorical refusal.[8] Since that time the Chinese

[8] *Vide:* Appendix A, for the full official texts of these notes of March 10/14, 1923. It appears that the action of the Chinese Foreign Office in forwarding this note to the Japanese Government was largely influenced by the strong attitude of both houses of the Chinese Parliament on the subject. On Nov. 1, 1922, the House of Representatives passed a resolution urging that the President of the Republic forward a note to Japan demanding the immediate cancellation of the treaty of 1915 and the restoration of Kwantung lease to China. Certain senators, apprehensive of the possible effect of such an action on relations with Japan, opposed the resolution, and, consequently it was temporarily pigeon-holed by the Senate. On Jan. 17, 1923, however, the House of Representatives debated and adopted another similar resolution, which the Senate was constrained to adopt on Jan. 19. Under the then constitution of China, it was provided that the President, if opposed to any resolution or act of Parliament, must refer it back to that body with objections within ten days. Such resolutions or acts might then become binding upon the executive if passed over his veto by a two-thirds majority. Commenting on this situation which impelled the President to instruct the Foreign Office to despatch the note to Japan on March 10, the *Japan Advertiser* (American-owned and edited) for March 2, 1923, contained this statement: "The agitation for the eviction of Japan from Manchuria began in the reconstituted Parliament, which has risen to a new plane of influence in recent months, largely through the patronage of powerful military chieftains. Since both houses of the Parliament had passed the resolution declaring the 1915 treaty void, it is more than likely that the Cabinet transmitted the resolution to Japan merely to appease the legislature and without any other expectation than a firm denial from Tokyo".

For contemporary data on China's attempt to secure abrogation of the 1915 treaty and the return of the Kwantung lease the following references to the *Japan Advertiser* are pertinent: Nov. 17, 1922; Jan. 19, 21, 28; Feb. 28; Mar. 1, 2, 3, 7, 9, 15, 16, 20, 22; Apr. 2, 5, 1923. Also: The *Peking Leader,* Mar. 1, 1923; The *Chinese Students' Monthly,* March, 1923; the *China Year Book,* 1924, p. 864.

Government have not assumed an official position that Japan no longer remained in legal possession of the Kwantung leased territory, the fact being illustrated by the lack of any official reaffirmation of the Chinese attitude expressed in the note of March 10, 1923, and by the *de facto* situation acquiesced in, in practice, by the Chinese Government. The Sino-Japanese postal agreement of 1922, for example, which contained clauses specifically recognizing Japanese possession of the leased territory, remained in complete operation for many years subsequent to 1923.

There is special purpose in drawing attention here to contentions which have been made, from time to time, by individual writers to the effect, that, on various grounds, the Sino-Japanese treaty and notes of 1915 with respect to South Manchuria are void or voidable. There has been far too much confusion, even among foreign publicists, between such contentions and the official attitude of the Chinese Government. It may, then, be repeated that the Chinese delegation at the Washington Conference did not declare these agreements to be void, and did not assert that they were voidable by application of the doctrine of *rebus sic stantibus* or of alleged duress attending the negotiations. These, and the grounds that they are void or voidable because of unconstitutional or illegal procedure in negotiation and ratification in China, of the non-alienability of the territory intrinsically and their inconsistency with the exis-

tence of China as a sovereign state, are private contentions.[9]

The Japanese Government have, of course, acted on the assumption of the unquestioned validity of these agreements. The statements of the Japanese delegation at the Washington Conference may be taken as the clearest expression of their official position in the matter. This position is a fair description of the views of Japanese publicists on the subject.[10]

[9] For a compendium of such private contentions reference may be made to the following: *Chino-Japanese Treaties of 1915*. Published for the China National Defense League in Europe, etc. London, during the Paris Peace Conference.

[10] Cf. Ichihashi, Y. *The Washington Conference and After*, pp. 261 ff., pp. 289 ff. Dr. Ichihashi characterizes the so-called "Twenty-one Demands" as "the most serious diplomatic blunder yet committed by Japan" (p. 302), but affirms the validity of the treaties and notes exchanged in May, 1915, thereafter. Cf. Dr. Suehiro's interpretation of the subject in The *Japan Chronicle*, Feb. 1, 1923, pp. 134, 143. For editorial opinions of Japanese newspapers on the point the following notices are of interest: *Japan Advertiser* Jan. 23, 1923; Jan. 24, 1923; and the editorial comment of the *Japan Advertiser*, Mar. 2, 1923: "The unanimity of Japanese opinion with respect to the Kwantung Leased Territory and the South Manchuria Railway is the most significant feature of the situation raised by China's demand for the abrogation of the Treaty of 1915. . . . . Japanese sentiment regarding Kwantung and the railway, which constitute the backbone of the Japanese position in Manchuria, has achieved an intense union of all shades of political belief such as we do not remember since the declaration of war against Germany. The most liberal newspapers which favored the retrocession of Shantung and fought valiantly against the continued occupation of Siberia, are almost as strong in their denunciations of the Chinese demands as the most jingoistic." The so-called "Twenty-one Demands" themselves, particularly the submission of the ultimatum to China during their presentation, had, at the time, vehement opponents in Japan, and particularly in the Terauchi ministry and the Diet session of 1916, but, these demands having been in part written into treaties, Japanese publicists and the public generally are not inclined to question their legal validity.

At the conference the Japanese delegation declared that Japan " cannot bring itself to the conclusion that any useful purpose will be served by research and re-examination at this Conference of old grievances which one of the nations represented here may have against another ".[11] The so-called " Twenty-one Demands ", said Mr. Hanihara, was a question " to be taken up between Japan and China, if it were to be taken up at all, and not at this Conference ".[12] In the thirteenth meeting of the Committee on Far Eastern Questions, February 2, 1922, the Japanese delegation reasserted the binding validity of the treaties, declared that China's request for cancellation was tantamount in itself to a recognition of the binding force of the same, and declared that an " exceedingly dangerous precedent will be established, with far-reaching consequences upon the stability of the existing international relations in Asia, in Europe, and everywhere " if it were to be allowed that " rights solemnly granted by treaty may be revoked at any time on the ground that they were conceded against the spontaneous will of the grantor ".[13]

[11] *Conference Proceedings*, pp. 1508-1510.

[12] *Ibid.*, p. 1160.

[13] *Ibid.*, pp. 1508-1510. To this statement the Chinese delegation replied that " a still more dangerous precedent will be established with consequences upon the stability of international relations which cannot be estimated, if, without rebuke or protest from other Powers, one nation can obtain from a friendly, but in a military sense, weaker neighbor, and under circumstances such as attended the negotiation and signing of the Treaties of 1915, valuable concessions which were not in satisfaction of pending controversies and for which no *quid pro quo* was offered ". (*Ibid.*, pp. 1556, 1160.)

Japan also asserted that the conference clearly recognized concessions "made by China *ex contractu,* in the exercise of her own sovereign rights", as not inconsistent with the principles adopted by that conference. The Washington Conference, therefore, took no official action as to the validity of the Sino-Japanese treaty and notes of 1915 with respect to South Manchuria and the extension of the lease of Kwantung to 1997.

Prefatory to a consideration of the validity of the Sino-Japanese treaty and notes of 1915 which extended the Kwantung lease to a full period of ninety-nine years, two facts should be clearly kept in mind: the Chinese Government have not officially either declared them invalid and of no force intrinsically, or abrogated them either by declaration or specific action in evidence of abrogation; and, secondly, no third state has ever officially contested the validity and enforceability of those agreements. What the Chinese Government have done is to state specific grounds on which China contends that they are *voidable.* From a strictly juristic point of view, China's request for their abrogation at the Washington Conference may be taken as tantamount to an acceptance of their existence in fact. The Chinese delegation, however, reserved the right to "seek a solution" of the general "question" on all future appropriate occasions".[14] The attitude of third states, including Great Britain and the United States, so far as ex-

[14] *Conference Proceedings,* pp. 1556-1560.

hibited by their actions with respect to the Kwantung leased territory, actually is one of recognition of the validity and binding force of those agreements of 1915.[15] The *de facto* situation, which is declaratory of their official attitude, is described by the fact that the British and American consuls at Dairen in the leased territory receive their exequaturs from the Japanese Government.[16]

In view of the various opinions which have been expressed by writers concerning the validity of the Sino-Japanese treaties and notes of 1915, particularly as they effected an extension of the Kwantung lease to ninety-nine years, clarity will be served by distinguishing between two distinct questions: Are these agreements *ipso facto* void, nugatory and intrinsically unenforceable? Are they voidable or, from the point of view of international law, of such

[15] During the negotiations of 1915 the United States addressed a note of March 13 to the Japanese Ambassador at Washington which, while raising several questions with regard to the character of the proposals submitted by Japan, nevertheless contain no official protests against the provisions for the extension of the Kwantung lease or the period for Japanese possession of the South Manchuria Railway. (*U. S. For. Rels.*, 1915, pp. 105-111.) Again, on May 13, Secretary Bryan addressed a note to the Japanese Foreign Office in which he reserved American rights under their China treaties, but expressed no definite objections to the portions relating to the extension of the Kwantung lease. (*Ibid.*, p. 146.) The British Government, similarly, raised no objections to the extension of the Kwantung lease, or questioned the intrinsic validity of the transactions securing it. (*Parl. Debates*, March 12, 1915, Vol. 71, p. 1657.)

[16] Cf. *U. S. v. A. W. Smith*, 1925. In this case before the U. S. Court for China, Shanghai, Judge Purdy accepted the validity of the 1915 treaty and notes.

a character as would justify unilateral abrogation by the Chinese Government?

That the Sino-Japanese treaty and notes of 1915 pertaining to South Manchuria and Inner Mongolia are void is denied by the declarations and practice of the Chinese Government. That government has never declared them void and non-enforceable, and as a result those agreements have been regarded officially both by China and Japan as valid conventions, in pursuance of which they have subsequently entered into mutual agreements predicated on the existence of the 1915 agreements. The Chinese delegation at the Washington Conference did not declare them void, but presented reasons why they might be considered voidable, and by so doing, that is, by requesting abrogation of them, admitted that for the time being, they were still valid agreements. The Japanese delegation called attention to this position of China by stating that a request for cancellation was tantamount to an admission of their existence in law.[17]

As to the practice of the Chinese Government which may be taken as descriptive of their official attitude toward the 1915 agreements relative to Manchuria, it is evident that inasmuch as the provisions extending the Kwantung lease term were but a part of the several Manchurian agreements negotiated simultaneously, and, in fact, in the same document in some cases, the acceptance in practice of these

[17] *Conference Proceedings*, pp. 1556-1560.

other commitments serves to establish the entire Manchurian group, including the provision extending the Kwantung lease, as binding and enforceable. Moreover, in pursuance of those agreements the Chinese Government have subsequently entered into at least one Manchurian agreement with Japan which was predicated on the assumption of the existence of the 1915 agreements. This was the loan agreement for the Kirin-Changchun railway, signed October 12, 1917.[18] Among the various commitments in the 1915 agreements pertaining to Manchuria which have in practice been considered binding by the Chinese Government are the provisions whereby the Japanese Government were permitted to designate certain cities in Inner Mongolia to be opened by China to foreign trade and residence, and the provisions granting Japanese nationals the right to prospect and work certain coal and iron mines in designated regions in Fengtien and Kirin provinces. It is not necessary, therefore, to raise the question of their more general acceptance by the *de facto* Mukden Government of Manchuria during 1925-26, for example, to illustrate how, from a purely juristic point of view, the Sino-Japanese treaty and notes pertaining to South Manchuria and Inner Mongolia have been accepted in practice by the Chinese Government as valid and enforceable.

The Chinese Government, in spite of temporary acceptance of the 1915 agreements as valid and en-

[18] MacMurray, Vol. II, p. 1390.

forceable, have, however, taken such official action as would enable that government to open the entire question when an opportune time presented itself. Their declarations at the Washington Conference and their communication to the Japanese Government of March 10, 1923, requesting abrogation of the provisions of the 1915 agreements extending the Kwantung lease to 1997, are evidences.

On what grounds, then, might the Sino-Japanese treaties and notes of 1915 pertaining to South Manchuria and Inner Mongolia be claimed voidable by the Chinese Government? By alleging procedure in their negotiation to have been improper and not in conformity with the established practice of China for negotiating treaties? By claiming that attending duress, coercion or *force majeure* was of such a nature as to invalidate the agreements? By asserting that no *quid pro quo* was offered by Japan? By declaring that the agreements intrinsically were in violation of China's treaties with other states? By submitting that the agreements were inconsistent with the Nine-Power Treaty of the Washington Conference concerning principles and policies to be followed with respect to China? By representing them as conferring rights inherently inalienable? By assuming, finally, that by invoking the principle of *rebus sic stantibus,* on the ground that fundamental conditions had changed since 1915, the Chinese Government could unilaterally declare them abrogated?

International law should conform as closely as possible to abstract principles of "equity and justice," but that the unilateral allegation of moral wrong and of resulting injustice *ipso facto* are sufficient, from a juristic point of view, to invalidate an international contract once signed by two states, is an assertion which has not yet found universal acceptance either among the publicists or in practice. The determination of alleged injustice is not within the legal province alone of the state against whom the injustice is alleged.

Moreover, international law is still so indefinite on many of the points raised here, so suffused with what amounts to doctrines or rationalizations which seek to make "legal" much of what a state can do with actual impunity, so inebriate when confronted with the superior strength of state action, so pliable when urged to transform a *de facto* position into a *de jure* one, so apparently accommodating in its service to those who seek to use its precepts to prove a nationalistic case, that one hesitates to resort to some of its assumed doctrines for fear of being accused of attempting to create international law where none exists. And yet, without presuming to be exhaustive in the effort, there would seem to be practical purpose in an attempt to summarize briefly the principles of international law which are presumably applicable to the question of the voidability of the Sino-Japanese treaties and notes of May 25, 1915.

It has been contended by various writers, though apparently not by the Chinese Government, that the Sino-Japanese treaties and notes of 1915 are invalid or voidable because the Chinese plenipotentiaries, that is, President Yuan Shih-k'ai particularly, exceeded his constitutional authority and that these agreements not only did not receive ratification from the Chinese Parliament, but were later definitely repudiated by a subsequent act of Parliament.[19] Similarly, it has been argued that because a Chinese Parliament later specifically repudiated the agreements " this action automatically cancels the consent given by China's representatives in 1915 ".[20] Oppenheim has been cited to the effect that " such treaties, concluded by Heads of States, or representatives authorised by these Heads, as violate constitutional restrictions, are not real treaties, and do not bind the State concerned, because its representatives have exceeded their power in concluding the treaties ".[21] This principle is one of practically universal acceptance.

A reasonable interpretation of this generally accepted principle, however, would require careful attention to the realities of the particular circumstances attending the negotiations in question. The official practice of China as a state differed at that

[19] *Chino-Japanese Treaties of 1915,* p. 19; Millard, T. F. F., Testimony before Senate For. Rels. Committee, *U. S. Senate Documents,* Vol. 10, 1919, 66th Cong., 1st Sess., p. 446.

[20] Clark, Grover, *Peking Leader,* editorial, March 1, 1923.

[21] Oppenheim, L. *International Law,* Vol. I, p. 709 (4th ed. 1928.)

time very widely from the letter of the so-called constitution; so widely, in fact, that the practical dictator, Yuan Shih-k'ai, supported by an illegally constituted rump " legislature ", had " amended out of existence " the so-called " constitution " which presumably would otherwise have been applicable,[22] The Parliament, which had actually been abolished in January, 1914, by Yuan Shih-k'ai, had been itself a parlous picture of a constitutional reality, and, as the eminent Chinese scholar, Liang Ch'i-ch'ao, described it, a body incompetent to organize itself, irregular, and concerned more with petty wrangling than with the momentous international questions which confronted China.[23] During March to May, when these agreements with Japan were being negotiated there was, in fact, no parliament in China properly so called. " President " Yuan Shih-k'ai was practically a dictator, whose monarchical aspirations were supported by a strong faction of politicians in actual possession of authority. " President " Yuan signed those agreements as the only Chinese commanding authority in and for China from the point of view of competence to deal with foreign states. Moreover, the treaties of 1915 with Japan were not isolated cases, for several treaties with foreign states were negotiated during this period and after, which were

[22] Vinacke, Harold M. *Modern Constitutional Development in China*, p. 174. Cf. Bau, M. J. *Modern Democracy in China*, pp. 97-98; Hornbeck, S. K. *Contemporary Politics in the Far East*, pp. 49-50.

[23] Vinacke, *op. cit.*, p. 176.

never ratified by any Chinese parliament.[24] These, without exception, have been considered binding by the Chinese Government. These circumstances serve to illustrate how impossible it is to presume the unqualified application of certain rules of international practice which, though legitimately applicable in a constitutionally organized and politically ordered state, presuppose conditions which did not exist in this case.[25]

[24] For an illuminating description of the actual political situation in Peking during the years 1915 and 1916, see Paul S. Reinsch, *An American Diplomat in China,* Chs. XI to XVI inclusive. The organic law of China for this period was the Constitutional Compact, the amended Provisional Constitution, which had been promulgated on May 1, 1914, and remained, at least technically, in force until well after 1915. (Bau, *op. cit.,* p. 403.)

[25] A distinction should also be drawn between the international binding validity of an agreement and its status in the constitutional law of a particular government, party to such an agreement. Professor W. W. Willoughby, writing to this point, has stated the principle, generally recognized among states, that "it is recognized that the constitutional difficulty of the State is one that is self-created and may not be set up as an excuse for not carrying out the conventional or other obligations which its government has assumed or which are laid upon it by International Law". (*Fundamental Concepts of Public Law,* p. 313.) ". . . . In any given case, one State is entitled to rely upon the assertion of the executive head of a State or of his plenipotentiary agent, that he is qualified to negotiate a treaty which will be immediately binding without *ad referendum* proceedings. The assertion thus made might be without constitutional warrant, but the State would none the less be internationally bound, for it could not be held that the other contracting State would be qualified or obligated to determine the question, which might be a very technical one, of the proper interpretation and application of the provisions of the other State's constitutional laws." (*Ibid.,* pp. 313-314.)

With particular reference to the situation in China, Dr. Willoughby has recently written the following: "As a matter of fact, within recent years the Executive of China has entered into loan agreements

The circumstances of political disorder and of discrepancy between letter constitutions and the actual practice of state affairs apply similarly to the contention that because Parliament subsequently specifically singled out these 1915 agreements for denunciation they are, therefore, invalid. It is not clear, on the other hand, if strictly legalistic criteria be considered, that Parliament had any authority to denounce a treaty and by so doing makes it invalid as far as China's legal obligations arising therefrom are concerned. The Chinese Foreign Office, the official organ charged with the conduct of foreign relations, has exhibited in practice that those treaties are not to be considered void. The Chinese Government, therefore, has not considered itself bound by the act of the subsequent parliament in this matter. On the

with foreign bankers without securing the assent of Parliament, although the Chinese Constitution has expressly declared that all such loans, in order to be legally binding, must be assented to by the legislature. It is certain, however, that, should China later attempt to deny its obligations under the loan agreements thus entered into, it would be held that it was internationally estopped from so doing by reason of the fact that the other contracting parties assumed, and were justified in assuming, that the organ of government which China held out as qualified to conduct the negotiations, had the authority which it claimed to have, namely, to act in behalf of, and to bind, the Chinese State." (*Ibid.*, pp. 314-315.) Dr. Willoughby then lays down the following rule of interpretation of such agreements: "The proposition, then, comes to this: Peculiarities of constitutional structure of one State are without international significance to other States. Each State, as a member of the international society of States, has an organ of government through which it communicates with and enters into contractual and other relations with other States. Whatever undertakings are entered into by such organs are internationally binding upon the States which they represent." (*Ibid.*, p. 315.)

ground of improper procedure during the negotiation of the 1915 agreements, therefore, or by virtue of the subsequent expression of opinion of the Chinese Parliament, it does not appear that these agreements can legitimately be considered voidable.

Duress, coercion or *force majeure* has likewise been alleged as sufficient grounds for declaring the 1915 agreements void *ab initio* or voidable. That the Sino-Japanese treaties and notes of 1915 were forced on China there can be no doubt. Whether the ultimatum of May 7, however, was delivered by Minister Hioki without some form of solicitation from President Yuan Shih-k'ai himself is a question on which there is no unanimity of opinion, even among those more or less intimate with the negotiations.[26] Minister Reinsch is authority for the statement that "the paper on which the demands were written was water-

[26] The late Minister Reinsch admitted that Yuan Shih-k'ai "may have sought a certain *quid pro quo* in the form of Japanese support for his personal ambitions", and that if this be true, "Yuan himself in his inmost thought preferred that he should be forced to accept these demands through an ultimatum". Dr. Reinsch, however, considered "utterly fanciful" the assertion that it was Yuan himself who "originally conceived the idea of the twenty-one demands, in order that he might secure Japanese support for his subsequent policies and ambitions". (*An American Diplomat in China*, pp. 146-147.) Dr. Y. Ichihashi is, likewise, non-committal on this point, simply stating that "it is intimated in Japan that Yuan himself had suggested to Japan that she ignore the customary diplomatic practice and present her demands directly to him". He concludes: "At any rate, when the Yuan-Japanese relationship is understood, the extraordinary diplomatic method employed by Japan does not seem so unusual after all". (*The Washington Conference and After*, p. 303.) (*The Manchuria Daily News*, May 3, 1915; Yang, *op. cit.*, p. 173.)

marked with dreadnoughts and machine guns ".[27] In view of the fact that a very large part of those demands had actually been accepted before the ultimatum was delivered, a certain presumption arises that the ultimatum was, from the Japanese point of view, unnecessary to secure compliance with additional concessions sought. Yuan's possible desires and the obvious fact that the Okuma Government actually sought to disseminate the impression in Japan that there was a grave diplomatic crisis in China strengthens the view that there may have been a rather definite meeting of minds as to the utility of such an ultimatum.[28] It is, therefore, somewhat doubtful if the imposition of the ultimatum of May 7 is, considered realistically, evidence of entirely unmitigated *force majeure*. On the other hand, it is an established fact that at an early stage in these negotiations several thousand Japanese troops were moved to Dairen and Tsingtao, ostensibly for replacement, but actually to increase the garrisons at those places. This replacement took place before the usual time and the old garrisons, ostensibly to be relieved, remained at their posts throughout the negotiations until after the delivery of the ultimatum of May 7.[29] As to the circumstances attending these

[27] Reinsch, *op. cit.*, p. 131.

[28] For an illuminating discussion of this phase of the subject see the *Japan Chronicle*, June 9, 1921, an editorial on the courageous views of Mr. Zumoto, veteran editor of the *Herald of Asia*. The *Japan Advertiser*, April 5, 1923.

[29] Reinsch, *op. cit.*, pp. 138, 143. " . . . . Knowing, as Japan does, China's innate weakness Japan has sought to have all her preferential

negotiations, then, it is evident that, while the agreements were actually forced on China with a concurrent threat of force or reprisals, the enormity of the offense from a moral point of view may have to be considerably minimized when once the true rôle of Yuan Shih-k'ai is fully revealed.

The existence of a threat of force, even of a movement of troops ostensibly to induce a state to conclude negotiations for a treaty, is not, from a juristic point of view, sufficient to invalidate the agreement thus negotiated. Physical coercion or intimidation of the negotiators themselves on the other hand, may be sufficient cause to invalidate an international agreement thus negotiated. It is surprising that publicists continue to use the terms "duress", "coercion" and "*force majeure*" to apply to both these situations, especially since there is practical unanimity as to their distinct character. Treaties are, in a sense, contracts between states, and are

claims in China officially recognized by China before the witness of the world so as to safeguard her own interests securely first, and then to place China in a position beyond danger of being seduced by Germany and Austria to cede part of her territory, which contingency, if it were ever to come to pass, would destroy the whole object of the Siege War about Kiaochow." (Japanese editorial view: *Manchuria Daily News*, April 21, 1915.) "Japan has already augmented her military forces in China. Years ago, when President Roosevelt despatched the Atlantic Fleet to Japanese waters, Japan laughed in her sleeve at the rusty condition of the guns mounted on the American warships. Whatever attitude the United States might assume in connection with the Sino-Japanese negotiations, it is certain it would have no effect at all on Japan's attitude in regard to China." (*Manchuria Daily News*, April 7, 1915.)

binding only when negotiated with complete freedom of consent and action on the part of the actual negotiators. " The necessity of ' freedom of action ' applies only to the *representatives* * of the contracting States ".[30] To quote Professor Oppenheim farther: " It is *their* * freedom of action in consenting to a treaty which must not have been interfered with." The practical unanimity of authoritative writers in international law on this point makes it necessary to cite only a few of them.

John Bassett Moore asserts that " coercion, while invalidating a contract produced by it, does not invalidate a treaty so produced ".[31] Oppenheim is equally definite: " As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. (It must however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty.) . . . . But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time ".[32] Lawrence says of such

[30] Oppenheim, L. *International Law* ,Vol. I, p. 711. (4th ed. 1928.)
* Italics in the original.
[31] Moore, John Bassett, *Digest of International Law,* Vol. V, p. 183.
[32] Oppenheim, L. Vol. I, p. 711. (4th ed. 1928.)

treaties: " That they were extorted by force is no good plea for declining to be bound by them ".[33] Similar views are given by John Westlake and George Grafton Wilson.[34] This practically unanimous view of publicists is as old as Vattel, who wrote with reference especially to treaties of peace following war: " On ne peut se dégager d'un traité de paix en alléguant qu'il été extorque par la crainte ou arrache de force ".[35]

The practically unanimous statements of international law on this point, as interpreted by the publicists, to quote Professor Harold Scott Quigley, who has written authoritatively of the legal status of these treaties and agreement of May, 1915, " is sufficient warrant for rejecting the argument from *force majeure* on legal, however strong it may be on moral grounds ".[36] After an exhaustive treatment of this subject, Dr. Quigley concludes that the argument " which rests the incompetency of the Sino-Japanese treaty of 1915 upon Japan's use of *force majeure* appears to be without adequate basis in international law ".

Were it not for the presumed reluctance of the Chinese people to consider force as a necessary attribute of political life it would seem surprising that

[33] Lawrence, T. J. *The Principles of International Law*, p. 287. (3rd. ed. rev.)

[34] Westlake, Vol. I, p. 281; Wilson, G. G. and Tucker, G. F. *International Law*, p. 213. (7th. ed.)

[35] Vattel, *Droit des Gens*, Vol. IV, Ch. 4, Sec. 37.

[36] Quigley, H. S. "Legal Phases of the Shantung Question", in *Minnesota Law Review*, April, 1922, pp. 381-382.

their writers should so unanimously assert that duress attending the 1915 negotiations invalidate those agreements. "Force" may be intrinsically not so different from force of circumstances which, in turn, may counsel states to accept new conditions.[37]

Finally, in an effort to characterize the Sino-Japanese treaties and notes of 1915 as intrinsically unenforceable, or as of a character to justify their unilateral abrogation by China when an opportune time arose, it has been contended that these treaties are invalid *per se* because they impair the independence and sovereignty of China, and because they seek to alienate territory which is inalienable, due to their strategic importance to China. Oppenheim has been cited to the effect: "If the existence or necessary development of a state stands in unavoidable conflict with such state's treaty obligation, the latter must give way". Hall, likewise, has been cited: "An implied condition of the continuance of the obligatory force of a treaty is, that if originally consistent with the primary right of self-preservation, it remains so". The conclusion is drawn that: "Therefore, a treaty becomes voidable as soon as it is dangerous to the life of or incompatible with the independence of the state".[38] Dr. Hsia contends

[37] This resort to "force of circumstances" to seek a solution of outstanding international questions was the means by which the Chinese Government of Nanking in 1930-31 sought to abrogate unilaterally the treaties with foreign states which had given them extraterritorial rights in China.

[38] *Chino-Japanese Treaties of 1915*, pp. 19-20.

that " the inalienability of certain parts of a state's territory is a legitimate corollary of the principle of self-preservation ".[39]

Does international law recognize that an independent state cannot alienate its own territory by means of a treaty? Dr. Hsia, in another place, gives a defensible reply to this question when he asserts that " no serious students of international law have so far raised any doubt as to the legality of alienating certain parts of a state-territory or acquiring them from another ".[40] The fact is that any sovereign state can be constrained to alienate almost any portion of its territory, leaving but the mere vestige of a sovereign state. Dr. W. W. Willoughby, whose respect for the sovereign rights of states is well known, asserts that any sovereign state can be legally bound only by its own will, but when that will has been exercised, as through a treaty with a foreign state, " the State may go to any extent in the delegation of the exercise of its powers to other public bodies, or even to other States; so that, in fact,

[39] Hsia, Ching-lin. *Studies in Chinese Diplomacy*. pp. 118-119.

[40] *Ibidem*, pp. 117-118. There is a suggestion here of an analogy with the doctrine of territorial inviolability proposed at various times in France, especially by M. Thiers in 1871, when he sought to obtain aid from neutral nations to prevent the cession of Alsace-Lorraine to Germany. Commenting on this doctrine, Professor W. W. Willoughby dispenses with it tersely by the following: " This theory of territorial inviolability is so obviously artificial in character that it does not deserve criticism. It is upon a par with the theory of 'Legitimacy' that played a part in the deliberations of the Congress of Vienna ". (*The Ethical Basis of Political Authority*, p. 349.)

it may retain under its own direction only the most meagre complement of activities, and yet not impair its Sovereignty ".[41]

It has been held that the right of self-preservation is to a state a right which may be sufficient, in certain cases, to justify even the unilateral abrogation of treaties made with full consent on both sides.[42] But this right of a state to safeguard its own existence should not be used as an excuse to pursue national policies not otherwise defensible in international law, nor to denounce treaties which do not, in fact, prejudice the existence of the state as such. It is, therefore, difficult in the extreme to concede that " the leased territories in China are among the inalienable territories of China ", any more so than such territories as, since 1860, have been ceded in freehold to Russia, Great Britain, France and Japan, including the Maritime Province of Siberia, Hong Kong, upper Burmah, part of Indo-China and the island of For-

[41] Willoughby, W. W. *An Examination of the Nature of the State.* p. 196. (1911 ed.)

[42] There is, of course, no unanimity as to the definition and the superiority of this "right of self-preservation" among international jurists. Wolff, to whom the law of nations is much indebted for this doctrine, is criticized by Westlake, who also takes issue with Bonfils and Rivier, advocates of the superiority of the right of self-preservation over all other rights and obligations of states. Self-preservation, says Westlake, "is merely that of self-defence". A state can dismember itself by a treaty with another, but it also has the right to take steps in self-defence to protect itself against imminent danger of attack. Nor is the manner of exercise of the right of self-defence unqualified". (Westlake, *op. cit.*, Vol. I, pp. 293-300.) Note the relation of this same principle to the Japanese doctrine of "The Right to Live". (Cf. Young, *Japan's Special Position in Manchuria,* Ch. VII.)

mosa. The Kwantung leased territory is, no doubt, of great strategic and military importance to China, both because of its proximity to Peiping and because it commands the sea approach to Manchuria on the south. But, in a very real sense, this leased territory is no more prejudicial to the independence of China as a state than is the existence of Russian jurisdiction adjoining all the northern and northeastern frontiers of Manchuria. China today is far less in danger of partition or of destruction, or even of losing outlying territories, especially to Japan, than it was in 1895, 1898 or 1905. Moreover, it should be remembered that these leased territories in China, including the Kwantung leased territory, are not permanent alienations of Chinese territory, but only long-term leases, with jurisdictional rights transferred for the period of the lease. A conclusion derivable from these circumstances, one in entire accord with the realities which exist in the practice of the Chinese Government as to these leased territories, and as to the Kwantung leased territory in particular, is that, while these leased territories are illustrations of transfers of jurisdictional authority which politically continue to be undesirable from the Chinese point of view, they are, nevertheless transfers which nothing in international law either prohibits or discountenances.

* * * *

Perhaps it is superfluous to add—though this final caveat is so important that there is a danger that the

author's point of view may otherwise be misconstrued—that throughout the discussion and interpretation of Japan's legal position in the Kwantung leased territory, caution has been taken not to substitute moral for legal criteria. To seek to defend any particular national case with regard to this subject has been entirely alien to the writer's purpose. International law does not always conform to international morality, or even, in given cases, to international justice. The case of the so-called "Twenty-one Demands" is in point, and it is by no means an isolated one in international relations: recall the partition of Africa and the war-guilt sections of the treaty of Versailles. International law cannot be more moral than international custom. Force plays a leading rôle, in fact, in international affairs, and will continue to play its lawless part so long as the doctrine that a state knows no law above that which is of its own creation survives. The Sino-Japanese treaty and notes of 1915 are an illustration of this fact, than which there is none more illuminating.

The fact of attendant *force majeure* in these negotiations, as will be developed in the next section, may well be emphasized by the Chinese Government as a just cause for urging a reconsideration of the treaty itself. So also the claim that in those negotiations China received no *quid pro quo*. Against the Chinese claim the Japanese have law on their side, but, beyond that, the moral justice of the Japanese case is no more evident than that asserted by a certain

Athenian ambassador in the Peloponnesian war, countering the stigmatic censure of the Spartan magistrates who urged that that which was right in war was right in peace. This sophist view of the Athenian ambassador—hardly unsophisticated even today—is Japan's sole moral defense for the submission of the so-called "Twenty-one Demands" in 1915:[48]

"An empire was offered to us. Can you wonder that, acting as human nature always will, we accepted it and refused to give it up again, constrained by three all-powerful motives—ambition, fear, interest? We are not the first who have aspired to rule; the world has ever held that the weaker must be kept down by the stronger. And we think that we are worthy of power, and there was a time when you thought so too; but now, when you mean expediency, you talk about justice. Did justice ever deter anyone from taking by force whatever he could?"

[48] *Thucydides*, I, 76.

CHAPTER IX

China's Right to Recover the Lease

China's right to recover the Kwantung leased territory at the expiration of the present lease period in 1997, is explicit in the terms of the Sino-Japanese treaty and notes of 1915 with respect to South Manchuria and Eastern Inner Mongolia. The documents contain no provision for further extension. But the Chinese Government may well feel that the eve of the twenty-first century is a long way off! The question then arises, especially in view of the return of Kiaochow to China in 1923 and the retrocession of Weihaiwei in 1930, whether legal means are available for China to recover the Kwantung lease before the expired term. China's internal political life is today in a state of great flux, but there are evidences of definite progress toward political stability which make prediction of even the near future hazardous. May it not be possible that, even within the next decade, Japan and China will have been constrained to pursue policies, based on necessary compromise, which would tend to alter Japan's position in the leased territory?[1]

[1] In 1908 Professor K. Asakawa of Yale University wrote: "The conviction of the majority of Japanese statesmen concerning the future of Kwantung is difficult to ascertain, [but] there is a strong opinion, even among military and naval circles, that, at the end of the stipulated period of twenty-five years or in 1923, satisfactory arrangement should be made for a secure restoration of the territory into

At first sight it may seem that but one avenue is open to China by means of which the leased territory can be recovered: unilateral action in denunciation of the Sino-Japanese treaty and notes of 1915, with or without a plea that a change of circumstances has so altered the situation evident when the treaty was signed that it is no longer possible, or conducive to maintenance of China's position and prestige as a state, to continue to recognize it. There are, however, other alternatives which, it is believed, may be equally or more efficacious, and not discountenanced by international law. These will be given subsequent attention. But, as the efficacy of an appeal to the application of the principle of *rebus sic stantibus* has been most frequently discussed, it may be well first to treat of that means as it is found in international law.

1. The Principle of Rebus Sic Stantibus. States have frequently resorted to an appeal to the prin-

China's hands, never again to be wrested by any foreign Power. Nor is it probable that in 1923 the Chinese Government would consent either to renew the lease or to leave the territory in an uncertain position". (*Yale Review,* Nov. 1908, p. 272.) How true this statement was at the time may better be judged by the reader, but in 1923, when China demanded the return of the lease, Japanese public opinion of all political shades seemed unanimously in favor of retention indefinitely. Nor is there any evidence that this general attitude has materially changed. There are those in Japan, however, who, viewing the effectiveness of such reprisal instrumentalities as anti-Japanese boycotts and the present tendency of the Chinese in Manchuria to discriminate against the South Manchuria Railway, consider these factors as necessitating a new stock-taking of Japanese policy in Manchuria.

ciple, presumed to be an implied condition of any treaty, that when a fundamental change of circumstances has occurred which was not contemplated by either party to the treaty negotiated, or which make impossible or patently burdensome to one or the other state the continued fulfilment of that treaty, that instrument itself may be unilaterally denounced by either party. This is the principle, often called a doctrine, and perhaps improperly called the clause, of *conventio omnis intelligitur rebus sic stantibus.* It is, then, obviously contradictory, or at least an exception, to the universally recognized principle that treaties are to be observed explicitly—*pacta sunt servanda.* Its origin goes back to the Roman law when states' rights were not predicated on the assumption of the omniscience of the state as an entity. But it has been strongly advocated by certain publicists, from Machiavelli through Treitschke, Rivier and Bluntschli, who were disinclined to admit that there was any law above that of the state itself. The principle of *rebus sic stantibus,* therefore, has peculiar bedfellows—those who would press the analogy of private law situations in international dealings, and those who, while rejecting that analogy, place the state on Olympian heights above the defenders of a universal law which presumes to place limits on the state's own competence.

It is such a presumed international legal principle, then, with which we have to deal in appraising China's right legally to notify an otherwise non-

notifiable treaty. It is, moreover, patently impossible, because of space limits here, to give any exhaustive treatment of the subject of *rebus sic stantibus* itself. Yet, its importance is such that mere reference to it, without careful evaluation of the principle itself, would be worthless. In considering its possible application to the Kwantung leased territory, or to the general Japanese treaty position in Manchuria, the following questions must be asked. Is such a principle, called *rebus sic stantibus,* universally accepted by the publicists and manifested in practice in international dealings as an implied condition of any treaty? If so, when can it be applied, and under what circumstances? What are the opinions of the publicists as to the intrinsic justification of the principle under international law and its possible bearing on the present stability of the international system? Has the principle been recognized by arbitral or judicial tribunals? Do such precedents as may be derived from historical attempts of states to resort to the principle give evidence of its general acceptance as a part of international law? Is it, then, a part of international law? If a part of international law, what are the limits of its use?

We have the authority of a number of the publicists that the principle of *conventio omnis intelligitur rebus sic stantibus* is an implied condition of any or all treaties, and that this is itself almost universally recognized by the vast majority of publicists. These assertions, however, are extremely

misleading for, without defining one's terms, unanimity in generalizations is of little value. Oppenheim, for example, while admitting that there are dangers involved in its application, and noting that it had been " abused for the purpose of hiding the violation of treaties behind the shield of law ", affirmed the principle itself.[2] Lawrence, who did not accept the principle, nevertheless, declared it obvious that treaties " cannot remain unchanged forever ".[3] But this, it should be noted, is a very different thing from asserting that the implied conditions of any treaty are always definitely clear, and is, in itself, but the basis for rules of law which would explain just under what conditions a specific treaty might be denounced unilaterally by one part to the treaty.

The moment one enters into the field of inquiry as to when the assumed principle of *rebus sic stantibus* can be applied in practice one is confronted with no universally accepted rule of interpretation, and only dissention among the publicists. Perhaps there could be no question but that one of these conditions to any treaty is the continued maintenance of the states themselves: absorption of a material part of one

[2] Oppenheim, L. *International Law,* Vol. I, pp. 746-753. (4th ed.) Westlake affirmed: " Almost all theorists agree that to many treaties the tacit condition *rebus sic stantibus* is attached: they were concluded in and by reason of special circumstances, and when those circumstances disappear there arises a right to have them rescinded ". (*International Law,* Vol. I, p. 284.) (Cf. Fenwick, C. G. *International Law,* p. 344.)

[3] Lawrence, T. J. *The Principles of International Law,* p. 288. (3rd ed.)

state by an outside power might bring about such a change of circumstances that it would be patently impossible on the part of the other state to fulfill its obligation.[4] A large group of writers, particularly of continental Europe, with the support of the positivist, W. E. Hall, has claimed that if the observance of a treaty is prejudicial to the right of "self-preservation" of a state, the principle may be appealed to as sufficient grounds for denouncing the treaty.[5] Others, like Oppenheim, hold that, when the "vital development" of a state is prejudiced by a treaty, it may be denounced. Hall also offered the dictum that "neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory

[4] Fenwick, *op. cit.*, p. 345.

[5] Hall, W. E. *International Law*, pp. 361-370. (7th ed.) Oppenheim similarly held that when the existence of a state is in conflict with treaty obligations the latter must give way. ". . . . Every treaty implies a condition that, if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned." (Oppenheim, L., *op. cit.*, p. 748.) John P. Bullington, in an article entitled "International Treaties and the Clause *'Rebus sic Stantibus'*", shows the indecisiveness of Hall's dictum by asserting: "Thus an ambiguous clause is defined in even more shadowy and disputable phrases". (*U. of Pa. Law Review*, Vol. 76, 1927-1928, p. 170.) For a criticism of Hall, see Sir John Fischer Williams in The *American Journal of International Law*, Vol. 22, Jan. 1928, p. 89.

force at the time of its conclusion is essentially altered ".[6]

Among those who may be characterized as the strongest advocates of the principle of *rebus sic stantibus*, and who particularly would apply it whenever the right of "self-preservation" of a state comes into necessary conflict with an existing treaty, are Jellinek, Bluntschli, Rivier, Treitschke, Ullmann, de Louter, Schmidt, and Hall.[7] There is evidently among

[6] Hall, *op. cit.*, pp. 361-370. Westlake comments on this statement of Hall that the question only arises when there is a difference as to what conditions were implied, or were contemplated, "not as existent or possible, but as essential". (Westlake, *op. cit.*, p. 285.)

[7] Jellinek, who explained the reason for the existence of the principle in the nature of the state and its omnicompetence came precariously near the conclusion that treaties are merely "*chiffons de papier*". (*Die Lehre von den Staatenverbindungen*, pp. 100-104, Wien, 1882.) Bluntschli, holding that treaties are made essentially for the state's own good, came to a conclusion that states are to be bound by treaties only when they see them entirely unprejudicial to the interests of the state. (*Droit International Codifié*, Sec. 458, 460. 4th ed.) Rivier, that arch-advocate of the superiority of the state to all international law, held: "When a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere*. A man may be free to sacrifice himself. It is never permitted a government to sacrifice the state of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound to violate the right of another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse." (*Principes du droit des gens*, Vol. I, p. 277.) Treitschke, who maintained that the state was a "super-person", and, like Machiavelli, saw in the state an institution which possessed "so exalted and special a character as to render inapplicable to its acts the criteria of right by which the conduct of private individuals is to be judged" (Willoughby, W. W. *The Ethical Basis of Political Authority*, p. 123), affirmed that "the State is Power", and naturally came to the con-

the publicists who adhere to the positivist and Austinian concept of the state and the state's sovereignty a tendency to recognize the application of the principle of *rebus sic stantibus* the more unqualifiedly as these advocates tend to exalt the state above all other political institutions.[8] No one, perhaps, has

clusion that, there being no "power" or "force" above it, the state could abrogate treaties unilaterally to suit its own desires. (Treitschke, *Politics*, p. 3 ff. 1916 ed.) Ullmann and de Louter seem inclined, as most of the unqualified advocates of the Austinian concept of the state do, to emphasize that, because a state cannot be bound except by its own will, that will may change and there is no law above it. (Ullmann, *Völkerrecht*, 6, Tübingen, 1908; de Louter, *Le Droit International Public Positif*, pp. 172 ff. Oxford 1920.) Hall's views have been characterized above. Machiavelli's famous dictum reoccurs appropriately here: "Therefore a wise lord cannot, nor ought he to, keep faith when such observance may be turned against him, and when the reasons that caused him to pledge it exist no longer." (*The Prince*, Ch. 18. Marriott trans., p. 142.) He ought, said Machiavelli, to keep faith whenever possible, and when not possible, to be a good pretender—concealing a breach of faith under a cloak of morality.

[8] But there is a difference between advocacy of a concept of the state which disregards the accepted rules of international intercourse and international morality and the strictly formalistic and juristic concept of the state which admits that the state, as an entity having no legal superior, is nevertheless, obligated to observe both the accepted rules of international conduct and reasonable principles of morality and justice. Dr. W. W. Willoughby, perhaps the most consistent and ardent advocate of what may be termed a neo-Austinian and juristic concept of the state, admits of an international law as "a body of international principles" or a "system of jurisprudence" and departs from the narrow Austinian view of "international law" as merely a system of "positive morality". Consequently, Dr. Willoughby is not to be classified with those who, carrying the Austinian theory to its extreme, hold that the principle of *rebus sic stantibus* is merely one declaratory of the right of a state to do just about as it chooses to do in any given case. (Willoughby, W. W. *The Fundamental Concepts of Public Law*, Ch. XVI. "Sovereignty and International Law", pp. 278-306. Compare, however, his earlier view. *Nature of the State*, p. 199.)

written more incisively in criticism of this presumed right of self-preservation" than Westlake, who, while admitting the dictum of Wolff that a state ought "to preserve and perfect itself", nevertheless, stated that "the first interest of a society, national or international, is justice; and justice is violated when any state which has not failed in its duty is subjected to aggression intended for the preservation or perfection of another".[9] The principle of *rebus sic stantibus,* then, if generally accepted, would perhaps more often be used as an instrument of aggression than of defense against aggression, for the practical utility of its assertion will, as has been the case in the past, depend upon the physical or other persuasive force of the state applying it to compel compliance with its desires.

We turn, then, to the publicists who refuse to admit the principle of *rebus sic stantibus* as having any accepted place in international law, or who, while admitting the necessity of recognizing that some treaties in their nature manifestly become impossible of fulfilment through obsolescence or because conditions, patently essential to the enforcement of the treaty, are no longer existent, nevertheless, maintain that the principle of *rebus sic stantibus,* if admitted at all, should be used only in the most exceptional of circumstances, and then only in a limited few situations. We find here a still larger group. Among these is the majority of Anglo-

[9] Westlake, *op. cit.,* Vol. I, p. 299.

American writers, including Westlake, Oppenheim, Lawrence, and the contemporary publicists Sir John Fischer Williams, Brierly and Keeton.[10] Grotius "saw no legitimate relief for the suffering party, but

[10] "Anglo-American writers are practically at one in reducing within narrow compass the grounds on which a treaty becomes voidable". (Keeton, G. W. "The Revision Clause in Certain Chinese Treaties", in *The British Year Book of International Law*, 1929, pp. 111-136.) Westlake, as suggested above, took strong issue with both Hall and Rivier, and held that the so-called right of denouncing a treaty was "an imperfect one, demanding for its perfection in any case better definition than in the present state of international law is attainable". He did not, however, condemn it *in toto* but would have it restricted to narrow limits within which it should be exercised only "with a grave sense of moral responsibility". (Westlake, *op. cit.*, Vol. I, p. 285.) Oppenheim, who has frequently been cited as one who unqualifiedly maintained the existence of *rebus sic stantibus* as a necessary exception to the rule *pacta sunt servanda*, very definitely stated that "it is generally agreed that the clause (doctrine) *rebus sic stantibus* may only be resorted to in very exceptional circumstances, and that certainly not every change in circumstances justifies a State in making use of it". (Oppenheim, *op. cit.*, Vol. I, p. 758.) Lawrence avoided a definite statement on the subject, preferring to conclude that "when, and under what conditions, it is justifiable to disregard a treaty, is a question of morality rather than of law". (*Principles of International Law*, p. 288, 3rd ed.) Sir John Fischer Williams has recently directed criticism to Oppenheim's assertion that when an "unforeseen change of circumstances" actually imperils "the existence or vital development of one of the parties" it should have a right to demand to be released from a treaty. (*American Journal of International Law*, 1928, p. 89.) Professor Brierly does not admit such a doctrine in international law. (Cf. *The Law of Nations*, pp. 168-175; *Transactions of the Grotius Society*, Vol. XI, p. 13.) Professor Keeton, who has written of *rebus sic stantibus* in direct relation to the so-called "unequal treaties" in China, concludes that " . . . . from the standpoint of international law, it is not universally agreed that the doctrine of *rebus sic stantibus* is part of International Law at all, and that those authorities who admit it do not agree concerning its scope or the effect of it when invoked". (*The British Year Book of International Law*, 1929, pp. 111-136.)

would require the complete fulfilment of the terms of the treaty ". He held strictly to the rule that *pacta servanda sunt,* except in cases where it was " most patently clear " that the original circumstances were so changed as to make it absolutely impossible of fulfilment.[11] Vattel took a somewhat similar position maintaining that a promise given in a treaty was to be kept, and that " only a change in those circumstances which can lawfully hinder or suspend the effect of the promise ", namely, a change of circumstances *essential* to the treaty itself, can alter the general rule.[12] Bynkershoek, without hesitancy, rejected the unilateral denunciation of a treaty by one of its signatories.[13]

Most American writers seem to have made little effort to redefine or to improve the definiteness of the doctrine of *rebus sic stantibus.*[14] An exception

[11] *De Jure Belli ac Pacis,* Bk. II, Ch. XVI, Sec. 25. Cited by Fenwick, *op. cit.,* p. 346; Bullington, *op. cit., U. of Pa. Law Review,* Vol. 76, 1927-1928, p. 154.

[12] *Droit des Gens,* Bk. II, 296. Vattel did, however, hold a treaty voidable when its observance might lead to the ruination of the state.

[13] *Quaestiones Juris Publicae,* Bk. II, 10.

[14] George Grafton Wilson merely says that " the condition *rebus sic stantibus* is always implied "—without further attention to the host of conundrums that the statement inevitably produces. (Wilson and Tucker, *International Law,* p. 218, 7th ed.) Professor Freeman Snow, while instructor in international law and lecturer in the U. S. Naval War College, merely raised some question as to whether " self-preservation " was adequate grounds for denouncing an otherwise non-notifiable treaty. (*Naval War College Lectures: International Law Situations,* 1895, p. 74.) Samuel B. Crandall avoided the subject just where consideration of it would have been most appropriate to his study. (*Treaties, Their Making and Enforcement,* p. 250.) Recently, Professor Ellory C. Stowell has devoted a separate section to the subject

is Professor Charles G. Fenwick who tersely, but informatively, discusses the principle, and concludes that, while publicists "would appear to be correct in stating as a rule of positive law the general principle that all international contracts are entered into under certain implied conditions", "the conclusion to be drawn both from the practice of states and from the dicta of publicists and writers is that as regards the binding force of a treaty under a change of essential conditions international law has at present no definite rule which does more than approximate to an accepted standard of conduct".[15]

Sufficient has been said already, then to show that among the publicists, at least, there is no agreement as to *whether the principle of rebus sic stantibus is or should be* a part of international law. The disagreement itself is evidence that it *is not* a part of international law, for, if the term law has any significance at all in international relations, it must have a very close approach to universal acceptance—of

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of *rebus sic stantibus* without offering any treatment beyond well-known generalities. (*International Law*, pp. 402-403. 1931.) Professor Bullington's attention to the subject will be discussed later.

[15] Fenwick, *op. cit.*, pp. 344, 348. "Each case", according to Dr. Fenwick, "has been judged on its own merits and judged, it would seem, under circumstances which inevitably tended to produce a division of opinion among the members of the international community". (p. 348.) "There remains in the midst of this uncertainty merely the rule of good faith in its most general terms. The detailed applications of the rule in particular cases continue above the law, a matter for the moral conscience of the individual state, acting under a responsibility which international law creates but does not guide". (p. 349.)

which the views of the publicists should at least be declaratory. To recount the historical instances where the principle of *rebus sic stantibus* has been asserted by one or another state officially in particular cases, or to evaluate the treatment given the subject by arbitral of judicial tribunals is beyond the scope of this work. But nevertheless, a few conclusions may be hazarded, for it is imperative to know what has been the practice of states in this regard, even more so than it is important to note the opinions of the publicists. The statement of Professor Fenwick that the practice of states gives evidences that there is no generally accepted rule on the subject may be taken as authoritative.

The principle of *rebus sic stantibus* was asserted by one of the parties to a treaty, for example, in each of the following cases, but in each instance termination of the treaty, or replacement of it by another, was effected not by the unilateral denunciation of one state, but by bilateral or multilateral agreement: the case involving Russia's attempt in 1870 to secure the abrogation of the treaty of Paris of 1856 which provided for the neutralization of the Black Sea; [16]

[16] The classic example usually used to illustrate the principle of *rebus sic stantibus* as asserted by a state is that of Russia's attempted denunciation of the treaty of Paris (1856) which related to the neutralization of the Black Sea. Two facts concerning Russia's action in this regard in 1870 deserve special emphasis: first, the claim of *rebus sic stantibus* was not the sole grounds on which denunciation of the treaty was made; and, second, the action of Russia was neither approved by the powers, nor was the treaty of 1856 abrogated unilaterally by Russia. When, at the close of the Franco-Prussian war, the powers officially heard Russia's claim presented, it is noteworthy that

the attempt of Austria to claim the principle in justification of the annexation of Bosnia and Herzegovina in 1908; and the American resort to the principle to demand a revision of the Clayton-Bulwer treaty with respect to the Panama Canal.[17]

We have had, moreover, a resort to the principle of *rebus sic stantibus* by the Chinese Government in connection particularly with the termination of the Sino-Belgian treaty of 1865.[18] While in this case China officially declared that the League of Nations

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the conference in London rebuked Russia for having presumed that the principle of *rebus sic stantibus* was sufficient grounds for unilaterally abrogating any treaty. "It is an essential principle of the law of nations", said the conference, "that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers, by means of an amicable agreement." (*British and Foreign State Papers*, 1870-71, p. 1198.) Professor Bullington, commenting on this situation, correctly wrote: "Russia acted upon the theory of the *rebus sic stantibus* clause, but her act was recognized as legitimate by no other state." (*U. of Pa. Law Review*, Vol. 76, 1927-1928.)

[17] Although the United States *originally* contended that the principle of *rebus sic stantibus* was applicable to the Clayton-Bulwer treaty, the government later specifically recognized the inapplicability of the principle to this case. In 1896, Mr. Olney, the then Secretary of State, addressed to the President a memorandum in which, after having stated his own disapproval of the policy of his predecessors, he declared: "Upon every principle which governs the relations to each other, either of States or individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. If changed conditions now make stipulations, which were deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." (Lauterpacht, *op. cit.*, pp. 171-172. Footnote.)

[18] Keeton, Geo. W. in *The British Year Book of International Law*, 1929, pp. 111-136.

Covenant in Article 19 "clearly recognizes the fundamental principle of *rebus sic stantibus* governing international treaties which have become inapplicable" it is not evident that Belgium ever accepted the Chinese statement of the principle, or that the principle was accepted by other states. The Sino-Belgian treaty was, *in fact,* terminated legally by negotiation of a new one.[19] This last situation illustrates very clearly how important it is to provide by clear statement in any treaty, where it is at all possible, for its definite termination at a stated time. The most serious dangers, however, arise under treaties which in their nature cannot have stated periods, and must be either of long duration or perpetual. We may conclude, then, that while many states have resorted to the principle of *rebus sic stantibus* to notify an otherwise non-notifiable treaty, abrogation or revision has generally been secured not through action based on a recognition of the principle as a part of international law, but rather by agreement of the parties concerned in each case. Such evidence as may be adduced from the judgment of arbitral and judicial tribunals tends to the same conclusion, namely,

[19] Keeton, *op. cit.* Cf. *Chinese Social and Political Science Review,* 1926, *Public Documents Supplement,* p. 21. Similarly, with the abolition of the Turkish capitulations by the Treaty of Lausanne in 1923: Turkey claimed the application of the principle of *rebus sic stantibus* but the principle was not recognized as a part of international law by other states concerned, and, in fact, the capitulations were removed, not by operation of the principle, but by bilateral agreements with Turkey. (*American Journal of International Law,* 1926, Vol. 20, pp. 346-353; Keeton, *op. cit.,* p. 117.)

that *rebus sic stantibus* is neither a clearly defined principle, nor that it has as yet an accepted place in international law.[20]

We may conclude, then, that the principle itself is not as yet a part of international law, lacking as it does either the universal acceptance of the publicists, the evidence of acceptance in practice by states in their relations with one another, or the decisive and enforced dicta of arbitral or judicial tribunals.[21] The difficulty of laying down a hard and fast rule on this subject, particularly as the dangers to the abuse of the principle may tend to increase just to the degree to which acceptance of it becomes definitive, has so far prevented any codification of rules to the point.

[20] *Hooper v. The United States* (U. S. Court of Claims, 1887, 22 Ct. Cl. 408) has been erroneously cited in support of the assertion that a treaty may be abrogated by one party by asserting the principle of *rebus sic stantibus*. In this case the dictum of the court itself to the effect that "abrogation of a treaty may occur by a change of circumstances" clearly was delivered on the assumption that, in the case at hand, involving the Clayton-Bulwer treaty, there had been previous violation of the treaty on the part of Great Britain. (Scott's *Cases on International Law,* pp. 470 ff. 1922.) Professor John P. Bullington concludes his survey of such instances by asserting: "No case is known to the writer in which a nation has been able to escape treaty obligations because the other party recognized the clause *rebus sic stantibus* as implied in the treaty by international law". (Bullington, *op. cit.,* p. 167.)

[21] "The doctrine has *not* become a rule of positive international law; not only because the instances of its application are highly infrequent, but also because in those rare cases in which it has been invoked it has been rejected by the other contracting party against whose interests the denunciation of the treaty was directed." Lauterpacht, H. *Private Law Sources and Analogies of International Law,* p. 170.) (Brierly, J. L. *The Law of Nations,* pp. 168 ff.; Fenwick, *op. cit.,* pp. 344-348.)

There is, moreover, a large group of the contemporary publicists who see in a further development and application of the principle of *rebus sic stantibus* great dangers to maintenance of such stability as even at present exists in international life.[22] "There is," to quote Professor Keeton, "a danger that the rule of *pacta sunt servanda* will become increasingly qualified by the doctrine of *rebus sic stantibus*, and the value of international undertakings will be proportionately diminished".[23]

If, then, the principle is to be accepted at all—and on this the writer refrains from a judgment—it is believed its utility in an ordinary case should be limited to a claim of a right on the part of a state to be freed from the obligations of a manifestly obsolete or particularly burdensome treaty. But this claim of right, if properly supported, should be taken merely as legal evidence in support of a claim to termination. No state in itself should be permitted, without either the express consent of the other party to a treaty, or without the judgment of an impartial tribunal, to liberate itself from a prior treaty obligation.[24] Lawrence, who realized the danger of the

[22] Oppenheim, who favored some application of the principle, recognized this danger that states might abuse it "behind the shield of law".

[23] "It is submitted that the clause *rebus sic stantibus* as sustained by the majority of writers is so pregnant with danger as to outweigh any considerations of possible benefit which might be derived from it in exceptional cases." (Bullington, *op. cit.*, p. 174.)

[24] Oppenheim, after considerable circumlocation, comes to this same conclusion: "States and public opinion everywhere have come to

principle in its possible effect on the present world system, concludes with a statement which is particularly applicable to our own study: [25]

"Each case has circumstances that are peculiar to it, and we must judge it on its own merits, bearing in mind, on one hand, that good faith is a duty incumbent on states as well as individuals, and on the other, that no age can be so wise and good as to make its treaties the rules for all succeeding time."

2. Application of Rebus Sic Stantibus to the Kwantung Lease. The attention given the principle of *rebus sic stantibus* in the preceding section would seem to have been the more justified by the fact that nowhere has its non-acceptance in international law been less appreciated than in Eastern Asia. For any government to resort to the principle as such is to assume the existence in international law of something which is not to be properly characterized as a part of it. But, if, for purposes of describing its possible application to the Kwantung

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the conviction that the clause *rebus sic stantibus* ought not to give the right to a State at once to liberate itself from the obligations by the other parties to the treaty." The moment this becomes further qualified, unless by acknowledging the superiority of an impartial judgment of an arbitral or judicial tribunal, definite dangers are involved.

[25] *Principles of International Law*, p. 289, 3rd ed. Dr. Lauterpacht, after showing that the absence of a competent international tribunal has prevented the application of such a principle, and after suggesting that the World Court would be competent to pass on the purely *legal* phases of such an issue, asserts: "A treaty may become obsolete, oppressive, and out of accord either with postulates of justice or with political or economic conditions, and yet it need not necessarily come within the scope of the legal application of the *clausula*." (*Op. cit.*, p. 174.)

leased territory, it be conceded that such a principle were a part of international law, the question arises as to whether resort to it in this case would have any proper relation to the problem of this leasehold. There would be, then, but one central issue involved: have circumstances so changed since China covenanted to grant this lease to Japan, or agreed to its extension, that the principle of *rebus sic stantibus* is applicable?

Were there conditions existing in 1905, when Japan obtained the lease first, or in 1915, when Japan obtained the further extension of it to 1997, which do not exist today, and which make the treaties concerned patently impossible of fulfilment? With respect to the remaining leaseholds in China, Dr. Hsia Ching-lin has asserted that " China is entitled to the protection of the doctrine of *rebus sic stantibus* ".[26] In support of this assertion he notes that since the " balance of power " in the Far East has materially changed, since the anticipated " break-up of China " failed to occur, and since these were " the two real purposes behind these leases ", the treaties conferring them can be unilaterally denounced

[26] Hsia, Ching-lin. *Studies in Chinese Diplomacy*, p. 116. Care has been taken in the above sections to avoid describing the *principle* as a " doctrine ", for the latter connotes more or less universal acceptance or, at least, enforceability. (Cf. Professor McNair's edition of Oppenheim on the point.) Dr. Hsia quotes Dr. M. T. Z. Tyau: " The pretext for continuing in possession of the leased territory no longer exists today, and therefore such territories should be restored to the original grantor. *Cessante ratione, cessat lex ipsa*". (*Legal Obligations, etc.*, p. 71.)

by China.[27] Thus, it might be argued today that the return of Weihaiwei to China in 1930 strengthens this assertion.

Aside from the fact that the principle of *rebus sic stantibus* is not recognized as a definite part of international law, would its application, if admitted, be properly described as above? The first element to note is that the treaties in question were not those of 1898 granting Russia the original lease of Kwantung, but rather the ones by which Japan acquired the lease and obtained the extension, namely, those of 1905 and 1915. The second very obvious element is that there can be no question but that the signatories had but one intention in those treaties: in the Sino-Japanese treaty of December, 1905, to grant the lease to Japan; in that of May, 1915, to grant a further extension of the lease period. This, then, does not appear to be such a case as would justify the application of the principle of *rebus sic stantibus* at all, at least in the ordinarily accepted interpretations of it—a device to relieve either party from articles of a treaty which, while not inapplicable or

[27] "With the disappearance of Russia as an Asiatic power and the 'elimination' of Germany from Kiaochow, the policy of the 'balance of power' disappears". (Hsia, p. 115.) Perhaps it may be more adequately said that the policy of the "balance of power" has not disappeared, but that the term has become somewhat too suggestive to describe such offensive and defensive alliances as exist in Central Europe today! *En passant,* Professor Bullington has noted that the system of "balance of power" in Europe may have had a good deal to do with the development of the notion that treaties were to be understood as having an implied condition of *rebus sic stantibus.* (Bullington, *op. cit.,* p. 173.)

burdensome at the time of its negotiation, subsequently became so. These treaties were as burdensome when they were negotiated as they are today, and, unless it be conceded that either state in negotiating them did not know what was the natural result of granting complete jurisdiction to one party only, it could hardly be admitted that the Kwantung lease has latterly become so. The use which Russia had made of the Kwantung leased territory before 1905 is evidence that the Chinese Government recognized the political dangers involved in transferring it to Japan. Nor is there in the case of this leased territory a clear instance of a treaty which is manifestly impossible of fulfilment, or of a treaty which has become obsolete, and, hence, burdensome.

If, however, a change of circumstances were to be asserted, it would, of course, be necessary to describe such changes as had taken place, not since 1898, but since 1905 and 1915. To do so would be to pass judgment on questions of fact, not of law, and, if this is done here, it is only because something need be said to the point. The so-called "balance of power" in Eastern Asia as of 1898 was, in fact, completely upset by the end of 1905, particularly by the defeat of Russia in the war with Japan. Since that date, however, Russia has by no means disappeared as an Asiatic power. Contemporary Chinese opinion, looking to the results of the actual war, without a declaration of war, over the question of the Chinese Eastern Railway in the summer of 1929, and the

dominant position of Soviet Russia in Mongolia, could hardly be said to recognize that Russia as a vital state influence has disappeared, particularly from Manchurian diplomacy. The real menace of Soviet Russia for Japan, however, has apparently been very much exaggerated. Japanese publicists and certain of their statesmen, however, see in these circumstances adequate grounds for asserting that conditions have not so changed in Manchuria as to warrant return of Kwantung leased territory to China for the present.[28]

On these questions of fact or of diplomatic policy the writer refrains here from critical comment, concluding only with the assertion that, in a not impossible crisis in Manchuria, the principle of *rebus sic stantibus*, supported by the correlative so-called principle of necessity or of the "right of self-preservation", might be as illegally applied by Japan as by China. Westlake noted that there may be a difference of opinion as to what are the implied conditions of a treaty, and that, therefore, the so-called right of *rebus sic stantibus* was an "imperfect one". It may rather be, however, that Japan's

[28] Recall, for example, Japanese official statements at the time of the International Banking Consortium negotiations during 1919-1920, and the re-enforcement of the Changchun garrison at the junction of the South Manchuria Railway with the Chinese Eastern during the Sino-Russian conflict of 1929. Such an expression of opinion of one Japanese official, Mr. Y. Matsuoka, now a member of the Japanese Diet and formerly vice-president of the South Manchuria Railway Company, is worthy of notice. (*The Osaka Mainichi*, Nov. 6, 1929; *Manchuria Daily News*, Monthly Supplement, Dec. 1, 1929.)

principal motive for desiring to retain the Kwantung leased territory is rather the economic values—Dairen commanding the southern approach to the South Manchuria Railway, and the raw materials and markets which Japan believes essential to her existence as a state—than the strictly strategic values of the lease. China, likewise, can reasonably contend an increased dependence on her Manchurian territory to which the leased territory is a natural approach. Thus, so far as any legal evidence can be adduced in support of an alleged "change of circumstances" with regard to the Kwantung leased territory, it is quite manifest that *there are no facts,* speaking juristically. *Rebus sic stantibus,* the more unrestricted it be applied as grounds for notifying an otherwise non-notifiable treaty, tends to become a two-edged sword which may be used both for defense and offense, and the keenness of the one edge may be seriously damaged by the temper of the other.[29] The so-called "right of self-preservation" and the right to safeguard the "vital development" of the state are dangerous generalities which, in this day of economic interdependence of states, are more likely to be asserted effectively by a state having sufficient political and military power to illustrate their mean-

[29] It was by resorting to the principle of *rebus sic stantibus* that Austria claimed justification for the annexation of Bosnia and Herzegovina in 1908. These provinces had previously had a status superficially similar to a leased territory. It is generally admitted that China was in far greater danger of having her administrative integrity seriously impaired in 1915 than she is today.

ing than by a physically weaker state. At all events, the principle of *pacta servanda sunt* is as universally accepted a principle of international law as exists.[30]

We may conclude, then, that while the so-called principle of *rebus sic stantibus* is not to be taken as a constituent part of international law, it is, on the other hand, not necessarily an illegal principle, and that, therefore, a state may resort to it if it wishes, but should do so with the knowledge that affirmation of the principle in itself is not evidence of a right to terminate an otherwise valid treaty. The Chinese Government, *as a matter of policy,* could not be criticized for making use of the principle for bargaining purposes. That such use of the assumed principle as such is not likely to receive the support of third states, far less of Japan, is obvious from past events of diplomatic history.

[30] It is interesting to note that Dr. Léon Yang, who affirms the application of the principle of *rebus sic stantibus*—without citing authority as to its place in international law—does so especially with respect to Weihaiwei, having written his dissertation before the retrocession of that leasehold actually took place in 1930. It is noticeable that he refrains from applying the principle, and, therefore, of describing its application, to the case of the Kwantung leased territory. (Yang, *op. cit.*, pp. 158 ff.)

CHAPTER X

Diplomatic Negotiation and Political Means of Solution

Kwantung is not a perpetual lease, nor is there any presumption in favor of renewal upon the termination of the time limit now set for its duration.[1] That is sixty-six years from now—a period which, measured in retrospect from the present, would be as long as the time which has elapsed since the close of the American Civil War, since Minister Anson Burlingame resigned from his Peking post to negotiate for China the first treaty in which China was recognized as fully sovereign and equal in status with the states of the West, or since the period when Japan was still a feudal empire. The year 1997, therefore, may well be considered by China a long time to wait! Whether Japan will, therefore, retain possession of the Kwantung lease until that time is a fascinating subject for speculation.

Two conclusions have emerged from the presentation of testimony in the foregoing chapter. The

[1] The Sino-Japanese treaty respecting South Manchuria and Eastern Inner Mongolia, May 25, 1915, provides (Art. 1) that: "The two High Contracting Parties agree that the term of lease of Port Arthur and Dalny [Dairen] and the terms of the South Manchuria Railway and the Antung-Mukden Railway, shall be extended to 99 years." (MacMurray, Vol. II, p. 1220.)

The exchange of notes of the same date provided simply that the specific date for expiration of the lease of Kwantung (here referred to as Port Arthur and Dalny) should be 1997. (MacMurray, Vol. II, p. 1221.)

one was that, if strictly legal criteria be solely considered, China is effectively estopped for the present, from recovery of the Kwantung lease, either by asserting the intrinsically void character of the 1915 agreements, or by assuming them to be voidable on the ground of attendant *force majeure* or improper ratification and subsequent denunciation. The other conclusion, hardly more than suggested in the preceding sections, was that, from the point of view of international morality, China's claim against those agreements of 1915 is unquestionably much the stronger. This is not to say that the student of international law is indifferent to ethical considerations in any given case. International law should conform as closely as possible to international standards of ethics and of justice, and states, like the publicists, are not unmindful either of the censure of third parties on moral grounds or of the ethical ideal which, in fact, has played no small part in the development of state practices out of which international law itself has grown. A statement of a recognized publicist, Professor T. J. Lawrence, occurs appropriately here:[2]

"All we contend for is that the question what are the rules of International Law on a given subject, and the question whether they are good or bad, should be kept distinct. They differ in their nature and in their method of solution, and nothing but harm can come of any attempt to unite them. Yet it is the duty of publicists to put ethical considerations prominently forward in many parts of their work."

[2] Lawrence, T. J. *Principles of International Law*, p. 23, (3rd ed.)

It might be added that both contemporary publicists and states have come to discountenance those state acts which, in the nineteenth century, were looked upon, especially by such publicists as Rivier, Treitschke and others of the extreme positivist school, as morally justified merely because deemed practically necessary in the interests of a given state to enhance its power or provide for its presumed needs of development. International law, to repeat, is not unmindful of moral considerations, or blind to the equities of a given situation. No more convincing evidence of this emphasis today can be found than the provision of the statute of the Permanent Court of International Justice which permits of the decision of a case, under certain conditions, *ex aequo et bono*—in other words, on the basis of equity and the merits or justice of the case itself, without rigid reliance on legal technicalities. This provision suggests, for example, that international law may be expected to develop progressively toward the goal where it may be closely identified with justice itself. How rapid may be this development, and with what application to such a situation as the agreements of 1915 which extended the period of the Kwantung lease, to which such principles would have to be applied retroactively, are problems on which no cautious writer would presume to make a prophecy.

Differentiating, then, between strictly legal criteria, as at present derivable from contemporary international law, and ethical considerations, prac-

tically applicable to a given political situation but not in themselves necessarily creators of the rule of law, there is purpose in pointing the importance of a phrase in Professor Lawrence's assertion, quoted above, which was to the following effect: International law and international ethical considerations should be kept distinct. "They differ in their nature and in their method of solution." The latter, it would seem correct to say, is the method of solution by *political means*.

Here, again, it is imperative that the distinction between international legal means and political means be clearly understood. The latter, to be acceptable to international law, need only to be *not prohibited* by it. States are, therefore, within their rights in resorting to methods of protest, non-coöperation and boycott in the economic field, as well as embargoes, reprisals and retorsion, to secure redress against injuries which may or may not be in themselves illegal.[3] While neither reprisals nor retorsion could legitimately or reasonably be resorted to by China against a past and continuing injury, according to the Chinese view, involved in Japanese retension of the Kwantung lease, the rules of law applicable to them illustrate most clearly how relatively unrestricted is a state which seeks to resort to them to obtain redress for injuries from another.[4]

[3] Fenwick, C. G. *International Law*, pp. 420 ff.; Hyde, C. C. *International Law*, Vol. II, pp. 172 ff.; Wilson and Tucker, *International Law*, pp. 226 ff. (7th ed.)

[4] Retorsion is a form of retaliation in kind, or through means analogous to the act protested against as injurious: such, for example, as

But there is a field of *political action,* left open to an injured state, which is not only not proscribed by international law, but which is potentially applicable to such a situation as the Kwantung leased territory. China has not been estopped under recognized rules of international law from raising the question of an equitable solution of the issue of the extension of this lease whenever an opportune occasion arises. The Chinese Government has properly taken care on several occasions, notably at the Washington Conference in 1921-22, to reserve the right to reopen this question. The statements of Dr. C. T. Wang, reserving China's right to raise the question again through proper diplomatic channels, were these:

"Because of the essential injustice of these provisions, the Chinese Delegation, acting in behalf of the Chinese Government and the Chinese people, has felt itself in duty bound to present to this Conference, representing the Powers with substantial interests in the Far East, the question as to the equity

discriminatory tariffs, anti-alien land laws or harbor restrictions directed against a particular state. Reprisals, on the other hand, are usually defined to include any form of forcible redress, short of war, and differ from retorsions, first, in that they are usually resorted to against allegedly illegal acts of an offending state, and, second, in that they are not limited to retaliation in kind. (Cf. Fenwick, *op. cit.,* pp. 420-422.) "As in the case of retorsion, there are no rules of international law governing the resort to reprisals, other than the obvious rule that if redress be granted the property seized must be restored." (p. 422.) Retorsion may well be regarded, as by Dr. Fenwick, as a form of state action "on the outskirts of international law", for here is opportunity for a claim that the questions involved are "domestic questions". (Cf. Hyde, Vol. II, p. 174, for a more restricted definition of reprisals.)

and justice of these agreements and therefore as to their fundamental validity.

"If Japan is disposed to rely solely upon a claim as to the technical or juristic validity of the agreements of 1915, as having been actually signed in due form by the two Governments, it may be said that, so far as this Conference is concerned, the contention is largely irrelevant, for this gathering of the representatives of the nine Powers has not had for its purpose the maintenance of the legal *status quo*. Upon the contrary, the purpose has been, if possible, to bring about such changes in existing conditions upon the Pacific and in the Far East as might be expected to promote that enduring friendship among the nations of which the President of the United States spoke in his letter of invitation to the Powers to participate in this Conference."

Dr. Wang then presented four reasons [5]—in the main involving political and ethical, rather than legal, objections—which, he urged, should counsel that the Sino-Japanese treaties and notes of May 25, 1915, be considered "the subject of impartial examination with a view to their abrogation".[6] As an omen for the future, Dr. Wang presented the following resolution:[7]

"*Resolved,* That the negotiations carried on with China by the present Government have been inappropriate in every respect; that they are detrimental to the amicable relationship between the two countries, and provocative of suspicions on the part of the Powers; that they have the effect of lowering the

[5] These reasons were considered in a previous chapter.

[6] By inference, a statement technically admitting, for the time being, their binding validity.

[7] *Conference Proceedings*, pp. 333-334. (Sixth Plenary Session, Feb. 4, 1922.)

prestige of the Japanese Empire; and that, while far from capable of establishing the foundation of peace in the Far East, they will form the source of future trouble."

This declaration was made, said Dr. Wang, "in order that the Chinese Government may have upon record the view which it takes, and will continue to take, regarding the Sino-Japanese Treaties and Exchanges of Notes of May 25, 1915".[8]

This reservation of right on China's part has legal significance. It constitutes neither a declaration that the agreements are illegal and void intrinsically, nor an assertion of their voidability on specific legal grounds, but it does furnish evidence of China's intention, not disapproved by the Conference itself, to resort to such *political means* as might in future be available toward a solution in China's favor. This, then, is *not a closed question,* either in a strictly legal sense—in spite of the obvious strength of Japan's case on purely juristic grounds—or in, what is more important, a political sense. China has reserved the right to press for a revision of the 1915 agreements whenever an appropriate occasion arises.

[8] *Ibid.,* p. 334. These statements, originally made in committee, were subsequently made in a plenary session, and were entered upon the record of the Washington Conference as a part of its official proceedings. Dr. V. K. Wellington Koo, on the motion to incorporate Dr. Wang's declarations in the official record, explained that it should be understood that "the Chinese Delegation reserved their right to seek a solution on all future appropriate occasions" concerning this matter. The Chairman then stated: "Of course it is understood that the rights of all Powers are reserved with respect to the matters mentioned by Mr. Koo." (*Ibid.,* p. 338.)

What practical significance, then, may these factors have? In the language of diplomacy, these considerations strengthen China's "bargaining power". So also do the specific facts that, attending these negotiations of 1915, there was, on Japan's part, a threat of force; that the negotiations were, in truth, highly extraordinary, the demands and the ultimatum coming when there was no just cause for war on Japan's part and no justification for such extreme measures; that Yuan Shih-k'ai was forced into a position where he had to choose between the interests of his own country and his own political future; and that the element of a *quid pro quo* is entirely absent from these agreements. These factors, to repeat, are none of them, singly or as a group, sufficient to invalidate the agreements in strict law. They do, however, present a rather sordid picture of diplomacy by which a state would hardly be willing to be judged.[9]

Before treating of the only possible political solution which is likely to be at all productive of mutually satisfactory results, it may be pertinent, in the light of the distinctions drawn above as to the legal

[9] Few Japanese would today seek to defend in a foreign audience these agreements on grounds of their ethical standard. The world knows that no single act of Japanese diplomacy has been so subject to general censure as the so-called "Tewnty-one Demands". It should be recalled that the Terauchi Ministry which replaced Count Okuma and his cabinet bitterly censured these demands in open debate in the Diet in 1916. Japan's dilemma is to retain the most significant of what is left of the concessions thus obtained and, at the same time, be relieved of the censure which has not disappeared in the West, and, presumably, will have a long life in China.

and the political phases of this question of the extension of the Kwantung lease period, to raise certain questions as to whether alternate means are available for the parties in seeking a solution. Might the World Court or arbitration procedure offer assistance?

Three considerations influence the judgment that neither of these alternatives can at present offer any assistance. First, and of greatest practical significance, is the fact that the Japanese Government would hardly agree to a submission of the case to the arbitrament or adjudication of any outside or third parties. There is no evidence that the Japanese Government have altered the attitude expressed by Mr. Hanihara at the Washington Conference that this is a question which, " if it were to be taken up at all ", must be " taken up between Japan and China " to the exclusion of third parties.[10] No question, it may be added, between Japan and China concerning Manchuria has ever been submitted to arbitration or adjudication by an impartial tribunal. No bilateral general arbitration treaty exists between them. Nor is there any material evidence to show that the Chinese Government, any more than the Japanese Government, have expressed a willingness to provide such instruments of arbitration for Manchurian questions generally, or for such a question as the

[10] *Conference Proceedings*, p. 1160. The unanimous opinion of the Japanese group—conservatives and liberals—at the Third Biennial Conference of the Institute of Pacific Relations, held at Kyoto, Japan, in 1929, is further evidence. This latter conference was, of course, unofficial.

Kwantung leased territory in particular. Questions of vital interest to both states are involved, and each has preferred to deal with them through the ordinary channels of diplomacy and bilateral negotiation—except (and the qualification is important) where the one may have sought to obtain diplomatic support from third parties in particular emergencies.

In the second place, it is not evident that the organization and prestige of the Permanent Court of International Justice have arrived at such a stage of development and strength as to permit of their consideration of such a question as the Kwantung lease —an inseparable element in all fundamental Manchurian questions. The World Court has so far confined its activities to cases having no application geographically to Eastern Asia. Nor is the World Court to be censured for non-activity in a field where it has not been invited to participate. The World Court has yet to justify its name in Eastern Asia.

Finally, this is clearly a political question, one which, whatever the jurisdiction of the World Court to decide a given case *ex aequo et bono,* would involve factors which make it inconceivable that any " case " could be so framed as to warrant its submission to that body. Either state might well cite the public statements of the other during the past quarter century as to the relation of this territory to its " national security " or " national defense ".

But if one were to grant that a " case " could be so framed as to eliminate political questions, would it be possible for an international tribunal, either of adjudication or arbitration, to decide the issue on legal grounds? No court, properly so called, could disassociate such an issue from the warp and woof of Sino-Japanese relations in Manchuria, for the relations of the Kwantung leased territory are inextricably interwoven with the South Manchuria Railway, with the vested proprietary interests of Japan in these Manchurian areas, both in and outside the leased territory, with the questions of strategic security and of economic livelihood, in such a way that the task of a tribunal of law, or of arbitration, would be at once baffling and impossible of fulfilment. The issue—and an issue there is from a political point of view—is not a proper or possible subject for an adjustment either by arbitration or adjudication.

What of the League of Nations? Here is a body which does deal with political questions. The Chinese Government have, in fact, suggested that one or more Manchurian questions be presented either to the Assembly or the Council for consideration, as during the controversy with Soviet Russia over the Chinese Eastern Railway. The action in this latter case was abortive. Whatever may be said, however, with regard to the prestige of the League of Nations in China, particularly since the failure of China to secure re-election to a non-permanent seat in the Council, this situation is obvious: the League

has performed, and is now performing, notable services in Eastern Asia, but has never ventured to participate in any of the really vital political questions in the entire area. Nor is the League to be condemned for this. The point here made is that its activity in the Pacific Area has not established precedents in dealing with mooted political situations which would counsel immature meddling in Manchuria.[11] It may be expected, however, that the Chinese Government may raise this question, along with other Manchurian questions, in the halls of the League, and to do so by an appeal to Article 19 of the Covenant which provides for reconsideration of treaties "which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world".[12] The advisability and possible efficacy of such an appeal may well be left a subject for individual speculation.

Thus, it would seem, that the only course open for China in her declared policy of seeking a solution

[11] Ref. Young, C. Walter. "Sino-Japanese Interests and Issues in Manchuria", article in *Pacific Affairs*, Dec., 1928, esp. p. 20. Cf. also: *Problems of the Pacific*, 1929, pp. 216 ff.; 225 ff.

[12] Dr. Lauterpacht, discussing the jurisdiction of the World Court, after explaining that a treaty "may become obsolete, oppressive, and out of accord either with postulates of justice or with political and economic conditions, and yet it need not necessarily come within the scope of the legal application of the *clausula* [*rebus sic stantibus*]" concludes that the "remedy is here obviously a political one". (Lauterpacht, H. *Private Law Sources and Analogies of International Law*, p. 174.)

of the question of the extension of the Kwantung lease—for this, and related questions in Manchuria, are the principal treaty obligations still left as a survival from the commitments originally secured in 1915 after the submission of the "Twenty-One Demands"—is the avenue of bilateral diplomatic negotiation with Japan. *This is a political solution.* The indisposition of both the Chinese and Japanese governments to permit of intrusion of third parties into Manchurian questions—except in instances where an appeal by one may well be expected to be rejected by the other—is so evident as to require no further illustration.[18] But, as a practical means toward the goal which China seeks, there is room for doubt whether, should China seek to re-open this issue by addressing a specific communication to Japan, Japan would respond in any manner different from her reply to the Chinese Government on the same issue in March of 1923. That was a categorical refusal to discuss the question.

Diplomacy, however, may take other forms, based on compromise, and, granted a progressively developing internal political stability in China, this idea of the necessity of compromise may take on new

[18] Particularly evident at the Kyoto Conference was the unanimity of Japanese opinion that, if special machinery were to be created for adjustment of Manchurian questions, such machinery should be limited to that which might be established by the two states themselves. Mr. S. Takaishi's plan for a "joint conciliation board" is one, though not to be regarded as at all definite or of practical importance, which was limited by the provision that only Chinese and Japanese were to be "authorized members". (*Osaka Mainichi*, Nov. 5, 6, 1929.)

meaning. That this is recognized by certain circles of opinion in Japan is evidenced by the feeling among them that the present general treaty situation—whatever Japan's legal rights under such treaties as have established the foundation of her political and economic endeavors in Manchuria—is exceedingly unsatisfactory.[14] There are those who believe that Japan stands to suffer as much by perpetuation of the present treaty régime as does China. There are others, including Japanese, who believe that the time has already come when there is a necessity for a meeting of minds on Manchurian questions, particularly in the field of economic exploitation. And there are still others among the Japanese who have begun to do more than toy with the idea of Sino-Japanese coöperation, instead of hostile competition, in Manchuria. These are moved by mixed motives, one of which is undoubtedly the growing feeling that, unless diplomacy leaves its well-worn groove of conservative conformism to antiquated ideals of narrow self-interest, and makes a new and bold effort to remove the obvious psycho-

[14] For example, the following Japanese statement at the Kyoto Conference in 1929: "There is at least one Japanese who does not always wish to fall back on treaties. It is better to have some rules to go by, than none at all, but if the Japanese say that the sanctity of treaties must be observed, then it is inevitable that the Chinese will always return to this question. Treaties are made from time to time; they are remade, revised and discarded. If I represented my government, I would stick to the sanctity of treaties because I would have to, but here as an individual, I do not have to. Cannot we therefore approach this question, setting aside for a moment the sanctity of treaties?" (*Problems of the Pacific*, 1929, p. 185.)

logical obstacles to anything like sympathetic Sino-Japanese economic coöperation in Manchuria, the Japanese may be left, within even a decade, with huge investments which produce diminishing financial returns, and, eventually, as much of an economic burden for the state and the taxpayers as formerly these investments have been an asset. Are these Japanese too optimistic? Or are they far-seeing?

It is beyond the scope of this study to go farther afield from the legal implications involved in the issue of the Kwantung lease than to treat, as has already been done, of those *political means,* means which need to be discussed, if solely for the purpose of emphasizing that to be juristically estopped from appeal is not to be politically powerless. The efficacy of a policy, pursued wisely by China, and directed toward some form of solution of the lease question along with related matters such as the South Manchuria Railway, may well become more certain for China as particular eventualities, such as the return by the electorate of more liberal ministries in Japan, appear. China, too, has a certain potential "bargaining power", inherent in the strength of her moral argument, which may be reenforced in future by certain of those means of self-help which are, in cases, as effective as armed force, or more so. Of these none, in this situation, would be more influential than those passive weapons of protest and retaliation called economic non-coöperation and the boycott.

It is, too, beyond the scope of this study or the judgment of the author, to evaluate the possible results of the use of such weapons in this situation. Retaliation, either in kind or otherwise, might follow from Japan. China might have as much to lose as to gain by a resort to such strong measures. A cursory study of the interdependence of the Chinese and Japanese national economies, notably in the Yangtze valley as well as in Manchuria, raises the very question of the political wisdom of a state policy of aiding or abetting, overtly or covertly, a national boycott against the Japanese. The Chinese Government will have to weigh in the balance the relative values of particular state ends, one of which was so strongly urged by the late leader of Chinese Nationalism, Dr. Sun Yat-sen, when he said: "It will be absolutely necessary for us to borrow foreign capital." [15]

Two facts, however, would seem to have justified this intrusion of the subject of economic non-coöperation and even discrimination into this study, both of which are germane to the inquiry as to what are China's alternative means looking toward a solution of the issue of the Kwantung lease. The one is the status of such methods of self-help in international law. The other is the contemporary Japanese feeling as to the potentialities involved in their invocation.

[15] *San Min Chu I*, p. 443. (Price trans.)

As to the first factor, it is quite evident that, in the present stage of development of international law, there are practically no obstacles of a legal character to restrict their use.[16] These are *political* means, not proscribed by international law, in fact, even beyond that borderland of international law in which are the subjects of retorsion and reprisal, actually explainable, in an ordinary case, as being within the legitimate competence of a state to deal with " domestic questions ". The moment one seeks to apply such known principles of law as have been developed to the subject of boycott, for example, one is confronted with problems, not the least of which is that of defining particular types of boycotts and evaluating the degree of government connection with them. The boycott is today an international outlaw.[17]

The second fact, equally important here, is that the potentialities of a Chinese boycott and non-coöperation in economic and financial matters directed against Japanese enterprise are keenly appreciated in Japan. The Chinese people, abetted by their government at times, have already given some evidence of the fact that, as used by the Chinese,

[16] The reader may here be referred to the indecisiveness and disagreement in any half dozen recognized works in international law.

[17] In such a situation, of course, the provisions for severance of trade and financial relations with a recalcitrant state, contained in Article 16 of the Covenant of the League of Nations, have no application. These situations should not be confused. (Cf. Buell, R. L. *International Relations*, pp. 596 ff. (R. ed., 1929.) (Cf. *Problems of the Pacific*, 1929, p. 232.)

the boycott is potentially as much to be feared as open hostility. So vital has this subject become for Japan in her relations with China that a statement from Mr. M. Odagiri, director of the Yohohama Specie Bank, made at the Kyoto Conference of the Institute of Pacific Relations in 1929, may be given to support the assertion as to Japanese feelings on this subject:[18]

"One of the most important questions demanding careful study by the members of this Institute is the effect upon friendly international relations and commercial intercourse, arising from the application of the boycott as a weapon to compel acceptance of a national viewpoint. . . . .

"In view of these facts, it would seem that the continued application of the boycott as an instrument to settle international disputes is not only highly provocative and unjust in the light of accepted principles of international intercourse between friendly peoples, but, if war is to be condemned as an instrument of national policy, so also must the boycott be outlawed. . . . ."

The Chinese people used the boycott against American trade and financial interests in 1905, in protest against the exclusion laws, and in recent years have used it effectively against the British at Hong Kong and Canton, as well as, more conspicu-

[18] *Problems of the Pacific*, 1929, pp. 377, 379. Several round table discussions at the Kyoto Conference, which appears to be the first international organization, private in character, which has discussed this question with reference to Eastern Asia, presented occasions for Japanese statements opposing the boycott. Certain questions, pertaining to the relation of the boycott to contemporary international law, were raised by the writer at that Conference. (Ref. *Problems of the Pacific*, 1929, p. 232.)

ously, against the Japanese in 1915 and later. Local boycotts have occurred, though without far-reaching significance, in Manchuria. Economic non-coöperation, otherwise manifested than by boycotts, is today evident in Sino-Japanese relations in Manchuria. Japanese capital is not being sought by the Mukden Chinese authorities for construction of railways in Manchuria, and there is today obvious discrimination, whatever may be its effectiveness, against the South Manchuria Railway Company. The point here emphasized is, however, that, whatever their wisdom, such weapons of passive resistance as boycotts and refusals to encourage capital investment are potentially feared by thinking Japanese, and are, to repeat, evidently not proscribed by present-day international law.[19]

Do these measures of political action, which, in fact, may become influential even when not openly supported by the Chinese Government, furnish China with alternative means for seeking a solution of the

[19] No attempt has been made here to describe the economics of boycott. A large body of economists, German, French, English and American, agrees that the boycott is frequently a boomerang, injuring the state and people who seek to resort to it even more than the state against whom it is directed. Among such economists, who opposed the plan for an economic boycott of Germany following the World War, were W. H. Dawson, Charles Gide and Yves Guyot. (Ref. Friedman, E. M. *International Commerce and Reconstruction*, pp. 100-137.) The effectiveness of the boycott as a political or diplomatic device, depends, in a particular set of circumstances, on the economic interdependence of the two states between whom the boycott is made effective. A careful study of the history of particular anti-foreign boycotts in China would, perhaps, compel qualified conclusions as to their general effectiveness.

question of the Kwantung lease? This is not a new question among thinking Chinese. Nor would such opinions as have been expressed here come to them as at all novel. The sole reason for the discussion here has been to raise the question as to whether the issue, which may well be regarded as favorable to Japan, if purely juristic factors as to legality of treaties be considered, is, nevertheless, one with reference to which the Chinese Government is without *political means* of solution.

Diplomacy is, admittedly, a selfish business. Each state may be expected to safeguard its own interests. Each may be depended upon to seek its own ends as of primary importance. Until, however, those state aims are viewed in a longer perspective than, with respect to the Kwantung lease, they are at the present time, the issue itself will continue to crop up as an embarrassing problem of practical politics between China and Japan. The spirit of compromise, of a willingness to seek a solution on the basis of a *quid pro quo* has never yet been brought to bear on the question, or, for that matter, on that of the South Manchuria Railway. It would seem, then, premature to conclude that such a solution is impossible.

APPENDIX A

Official Texts of the Exchange of Notes of March 10/14, 1923, between the Chinese and Japanese Governments

Author's Note.—No official English versions of the exchange of notes between the Chinese and Japanese Governments, concerning the request of China for termination of the period of the lease of Kwantung and the reply of Japan, occurring during March 10/14, 1923, have previously been published in an authorized official version. The texts given below are the Japanese official versions which have been given to the author by courtesy of the Japanese Embassy, Washington, D. C.

Note from the Chinese Chargé d'Affaires in Tokyo Concerning the Sino-Japanese Treaties and Notes of 1915

Chinese Legation,
Tokyo, March 10, 1923.

Monsieur le Ministre,

I have the honour to transmit the following to Your Excellency under instructions from my Government under date of March 4, 1923.

In view of the friendly relations existing between Japan and China and of the fact that the nations of the world are making peace and are upholding the principles of justice, it is appropriate that Japan and China should endeavour to culti-

vate increased cordiality with a view to promoting the world's peace by safeguarding the peace of the Far East. In this connection it may be stated that the greatest obstacle in the way of cordial and friendly relations between Japan and China lies in the existence of the Sino-Japanese Treaties and Notes of May 25, 1915. At that time, the Chinese Government, after signing these treaties, issued a statement declaring that although China had been constrained to comply with the terms of the Japanese ultimatum, she disclaimed responsibility in case the treaty rights of other Powers were violated by these Sino-Japanese Treaties. Subsequently, at the Paris Peace Conference, the Chinese Delegation proposed the abrogation of the Treaties and the Notes exchanged between China and Japan, and the Chairman of the Conference, in reply, recognized the importance of the question. The proposal was renewed by the Chinese Delegates at the Washington Conference, the following being given as reasons therefor: Firstly, no *quid pro quo* was given for the concessions; secondly, the Treaties and Notes are in violation of treaties between China and other Powers; thirdly, the Treaties and Notes are inconsistent with the principles relating to China adopted by the Washington Conference; and fourthly, the Treaties and Notes have given rise to frequent misunderstandings between Japan and China. The Japanese Delegation, attaching importance to the Chinese proposition, declared that Japan would renounce her preferential rights regarding loans for the construction of railways in South Manchuria and Eastern Inner Mongolia and also regarding loans to be secured on taxes in those regions, as well as her preferential right concerning the engagement by China of Japanese advisers and instructors on political, financial, military and police matters in South Manchuria; and further that Japan would withdraw reservations with regard to Group V of the original proposals of the Japanese Government. However, the Chinese Delegates, after taking note of the claims given up by Japan and the reservations

withdrawn by her, were not yet satisfied in other respects and reaffirmed that the Treaties and Notes should be abrogated in their entirety, and declared that China reserved the right to seek a solution of the matter on appropriate occasions in future. This reservation of the Chinese Delegation was duly noted by the delegates of other Powers, formally announced to the Conference in plenary session by the Chairman, and placed on the records of the Conference.

The Treaties and Notes of 1915 have been consistently condemned by public opinion in China, and it was based on the wishes of the people that the Chinese Government brought forward at Paris and Washington proposals for the abrogation of the agreements in question. The Chinese Parliament in ordinary session in January, 1923, passed a resolution declaring the Sino-Japanese Treaties and Notes of 1915 null and void, and the Senate called on the Government to act accordingly. The foregoing facts are enough to show that the opinion of the Chinese people on the question has been unanimous throughout. The expiration of the term of the lease of Port Arthur and Dairen is near at hand, and the Chinese Government consider that the time is now ripe for improving Sino-Japanese relations, and declare that the Sino-Japanese Treaties and Notes of May 25, 1915, should forthwith be abrogated, except those clauses concerning which settlement has already been reached or regarding which the Japanese Government have either waived their claims, or withdrawn their reservations. The Japanese Government is hereby requested to appoint a day on which to discuss questions incidental to the restoration of Port Arthur and Dairen or consequent upon the abrogation of the Treaties and Notes in question. The Chinese Government firmly believe that the Government and people of Japan, realizing the importance of Sino-Japanese friendship, will comply with the above-mentioned desire of the whole Chinese people, and thereby remove entirely the obstacle which has stood in the way of

Sino-Japanese friendship and cordiality in recent years, to the end that real friendship may be promoted between the peoples of Japan and China and that the peace of the Far East may be further strengthened, which would accrue not only to the happiness of the two nations but to the welfare of the world at large.

The Chinese Foreign Office, in presenting to Your Excellency this note, a copy of which was simultaneously transmitted to His Imperial Majesty's Minister in Peking, beg that you will be good enough to make a reply thereto.

I avail myself of this occasion, etc.

LIAO EN-TAO,
Chinese *Chargé d'Affaires.*

NOTE OF THE JAPANESE GOVERNMENT IN REPLY TO THE CHINESE REQUEST FOR ABOLITION OF THE SINO-JAPANESE TREATIES AND NOTES OF 1915

March 14, 1923.

Note.—With reference to the note of Mr. Liao, the Chinese *Chargé d'Affaires* in Tokyo (the contents of which was made public on the 11th instant), Count Uchida, the Foreign Minister, asked the *Chargé d'Affaires* to come to the Foreign Office and handed to him the following reply at 10 o'clock, Wednesday morning. On the same day a copy of the same reply will be transmitted to the Waichiaopu by Mr. Obata, Japanese Minister to Peking.

I have the honor to acknowledge the receipt of your note of the 10th instant, in which under instructions from Peking, you were good enough to communicate to me the decision of your Government respecting the abrogation of the Sino-Japanese Treaties and Notes of May 25, 1915. After quoting the statement of your Government, published immediately on the conclusion of the said treaties, the statement of the Chinese

Delegation at the Paris Peace Conference, and the contentions advanced by the Chinese Delegation at the Washington Conference, your note concludes that the said treaties and notes should now be cancelled *in toto,* except those stipulations and reservations contained therein which have already been adjusted or which the Japanese Government have already renounced or withdrawn.

The Japanese Government are unable to conceal from themselves a sense of surprise and regret at the communication under acknowledgment.

The treaties concluded and notes exchanged in 1915 were formally signed by Japanese and Chinese representatives who were properly invested with full powers by their respective Governments, the treaties having been, moreover, duly ratified by the respective heads of state. The views of the Japanese Government concerning these agreements were declared by their delegates at the Washington Conference.

The attempt on the part of your Government to abrogate, of its own accord, treaties and notes which are perfectly valid will not only fail to contribute to the advancement of friendship between our two countries, but should be regarded as contrary to the accepted principles of international intercourse. This Government, accordingly, cannot in any way lend themselves to the line of action now contemplated by your Government.

The Japanese Government have always had near their heart the promotion of cordial relations between our two nations and they trust you will agree that their solicitude in that direction has been abundantly proved in their dealings with the Chinese Government by repeated acts of goodwill.

Furthermore, the Japanese Government have recently concluded new arrangements with China on certain matters stipulated in the said treaties and notes and have also declared their decision to waive the rights secured to them under various other clauses in the instruments in question and to with-

draw certain reservations made in them. In this situation, they feel compelled to declare that they find absolutely nothing in the treaties and notes which is susceptible of further modification.

It therefore seems to the Japanese Government that there is no occasion for entertaining in any way the proposals of your Government respecting the discussion of questions incidental to the restoration of Port Arthur and Dairen or consequent upon the abrogation of the said treaties.

I avail myself of this opportunity, etc.

COUNT UCHIDA,
Minister for Foreign Affairs.

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